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No. 90-1709

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

EUGENIE PARNAR,
Petitioner,

vs.

GREEN, NING, LILLY & JONES,
Respondents.

PETITION FOR WRIT OF CERTIORARI FROM THE JUDGMENT OF THE HAWAII SUPREME COURT

No. 14203

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QUESTIONS PRESENTED FOR REVIEW

1. Whether under the Seventh Amendment to the United States Constitution and Rule 38(a), FRCP, the prevailing plaintiff is entitled to a jury trial on "legal" issues when the attorney moves for imposition and enforcement of an attorneys lien on the civil judgment.

2. Whether a state-law issue involving the scope of the right to a jury trial in a civil case involves a "Federal question" within the meaning of Rule 10(b) of the Supreme Court Rules and related case law, when the state constitution and procedural rules incorporate federal standards for determining the state-law issue.

PARTIES TO THE PROCEEDING

The names of all parties appear on the caption. With regard to names of parent and non-wholly-owned subsidiaries of corporations, the Court is referred to Note 1, infra.

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OFFICIAL AND UNOFFICIAL REPORTS OF DECISIONS

The decision of the Hawaii Supreme Court in this case is unreported. Its text is contained in the Appendix hereto.

JURISDICTION OF THIS COURT

The judgment of the Hawaii Supreme Court in this matter was entered January 31, 1991. See Appendix. No rehearing has been requested, ordered, or denied.

Jurisdiction is conferred on this Court with regard to this petition by 28 USC Section 1257 and Article 3 Section 2 of the Constitution.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED IN THE CASE

The Seventh Amendment of the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall otherwise be reexamined in any Court of the United States, than according to the rules of the common law.

Article I, Section 13 of the Hawaii Constitution (former Article I, Section 10, as amended with respect to the amount in controversy) provides:

> In suits at common law where the value in controversy shall exceed five thousand dollars, the right of trial by jury shall be preserved. The legislature may provide for a verdict by not less than three-fourths of the members of the jury.

Rule 38(a), Federal Rules of Civil Procedure, provides:

> Rule 38. Jury Trial of Right
>
> (a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Rule 38(a), Hawaii Rules of Civil Procedure, provides:

> Rule 38. JURY TRIAL OF RIGHT
>
> (a) Right Preserved. The right of trial by jury as given by the Constitution or a statute of the State or the United States shall be preserved to the parties inviolate.

STATEMENT OF THE CASE

This is an extension of litigation which arose out of Plaintiff-Appellant and Cross-Appellee ("Parnar") firing in 1975 by

Americana Hotels, Inc.[1] Trial Court found the firing to be unlawful.

On October 24, 1977, Parnar filed a complaint in the First Circuit court charging her employers with wrongful discharge, claiming they had conspired "to induce her to leave the jurisdiction and prevent her testimony before the grand jury" in a Federal criminal anti-trust investigation. *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 373, 652 P.2d 625 (1982) ("*Parnar I*"); Record on Appeal, Volume I ("RA-I") at 1-11.

On October 28, 1982, In *Parnar I*, the Hawaii Supreme Court reversed the trial court order granting summary judgment against Parnar, and remanded the case for trial. On April 24, 1987, after trial before the State Circuit Court, a jury awarded Parnar $2,075,000.00 in damages. RA-X at 169-171.

The present proceedings involve the trial court's award by motion of an attorney fees award in excess of $1 million to the law firm, Green, Ning, Lilly and Jones (GNLJ) which represented her at trial and on appeal from the judgment in her favor. Parnar's attorneys from 1985 to January, 1987 had been the firm of Schutter, Cayetano, Playdon (RA-III at 1 and RA-VIII at 9-10).

On the day of the trial, January 28, 1987, trial date, Schutter, Cayetano, Playdon became so angry and indignant at Parnar's rejection of a $115,000 settlement proposal that David Schutter threatened to have Parnar examined by a court-appointed psychiatrist and declared incompetent. 7/7/89 Tr. at 20-22.

An attorney friend of Parnar's was present when Schutter tried to coerce her agreement to settle for $115,000 by threatening: to file a Motion for Determination of Competency as a means to have a psychiatrist appointed who would declare her incompetent and then have someone else come along and, on her behalf, settle.

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[1] Counsel for Parnar have attempted to determine whether there is any parent company or non-wholly-owned subsidiary of Americana Hotels (cf. Rules 14.1 and 29.1, Supreme Court Rules) and believe there are not. Counsel note that although Americana Hotels was a party below, it would appear to have no interest in the within proceedings, which involve only fees allegedly owed by Parnar to her trial attorneys.

7/7/89 Tr. at 21. The friend was "astounded at that kind of conduct." Id. Parnar told her friend she believed the attorney/client relationship with Schutter was over, and asked him to help her find new counsel. 7/7/89 Tr. at 22-23. Parnar wanted to go to trial and her friend told her to tell the judge that. Id. Schutter carried out his threat and filed a mental incompetency motion, asking Judge Marcia Waldorf to order Parnar's mental examination. 7/7/89 Tr. at 22-23. Judge Waldorf denied the motion, but pressured Parnar to settle, and granted Parnar only 24 hours to find new counsel when she refused. 7/7/89 Tr. at 25. Parnar's friend encountered Lilly of GNLJ in a courthouse hallway on January 28, 1987, and asked him to consider stepping in. 7/7/89 Tr. at 26.

Parnar's friend told Lilly that Parnar needed someone to take her wrongful discharge case, to sue Schutter for malpractice, to handle disciplinary proceedings and to oppose Schutter's anticipated attorneys' lien. 7/7/89 Tr. at 32, 33. Lilly replied, "[y]es, I want to take the whole case." 7/7/89 Tr. at 35. Based on Lilly's promises, the friend ceased his efforts to contact other counsel for Parnar 7/7/89 Tr. at 39.

When Parnar retained GNLJ in February of 1987, her case was ten years old. RA-I at 1-11. She had been to the Hawaii Supreme Court for a precedent-setting decision in *Parnar I*, and Schutter's firm had labored two years preparing for a January 28, 1987, trial date. 7/13/89 Tr. at 48. When Lilly replaced Schutter and obtained a two-month continuance in the trial date, Administrative Judge Philip Chun "froze" the case. RA-VIII at 49-50. No further discovery was permitted. 7/6/89 Tr. at 30. Witness and exhibit lists were closed. 7/7/89 Tr. at 31. As attorney Charles Ferrera testified, "[t]he case was ready for trial." 7/13/89 Tr. at 53. Lilly "had to take the case as [he] found it on January 30, 1987." 7/6/89 Tr. at 33.

Parnar's trial commenced April 13, 1987. 7/6/89 Tr. at 54. It lasted six days. Id. Parnar was on the stand for four of them. Id. According to Lilly, Parnar "did an outstanding job." 7/6/89 Tr. at 48. Lilly was right. The jury believed her, and awarded Parnar over two million dollars in actual and punitive damages.

Sometime after Parnar's April 24, 1987, jury verdict, Parnar called her friend and said Lilly would not take the discipline and malpractice aspects of the Schutter case despite their original agreement to do so. 7/7/89 Tr. at 44. Parnar and her friend met with Lilly, and Lilly confirmed GNLJ's refusal to represent Parnar against Schutter because "it would deteriorate into a personality fight." Id.[2]

On April 13, 1989, GNLJ filed a Motion for Partial Enforcement of Attorney's Lien. RA-XII at 30-85. On April 21, 1989, Parnar filed a response, arguing inter alia that the trial court had no jurisdiction to determine attorneys' fees by motion, and demanding a jury trial. RA-XII at 90-111. It was Petitioner's assertion that while the imposition of an attorneys' lien was an "equitable" matter to be decided by the Court, the amount of the lien presented "legal" matters which must be submitted to a jury. (Id.)

The factual issues Parnar asserted that needed to be resolved by the finder of fact included: whether the fee agreement had been entered into in good faith, whether it was voidable because entered into under duress, whether the law firm had taken "unfair advantage," whether the contract had been breached, whether the fee was "reasonable,"[3] and whether it should be voided and the fees determined on a "quantum meruit" basis (RA-XIII at 125-33).

First Circuit Judge Hiroshi Oshiro denied a jury trial (7/6/89 TR. at 3) and conducted a hearing on July 6, 7, 12 and 13, 1989. Six witnesses testified. Michael A. Lilly, Wayne S. Parsons,

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[2] For an additional breach of contract by Lilly see his August 20, 1987 request to "upgrade" his role by including appellate work 7/6/89 Tr. at 64 and Parnar's refusal to change the agreement. 7/6/89 Tr. at 65.

[3] GNLJ asserted on appeal that only the "reasonableness" of the fee had been made the subject of the jury request. However, it is apparent from the above that broader issues were involved, since Parnar claimed that all issues related to "the amount found to be due from the client to the attorney" should be submitted to the jury. (Plaintiff's Memorandum in Opposition to Motion for Partial Enforcement of Attorneys' Lien, RA-XII, at 93)

Richard J. Kowen and Eugenie Parnar were called by GNLJ, and Larry L. Zenker and Charles J. Ferrera were called by Parnar.

After four days of hearings, Judge Oshiro told counsel, "I will review my notes this evening and probably contact you tomorrow." 7/13/89 Tr. at 80. Judge Oshiro contacted counsel by telephone on July 14, 1989, and told them he had granted GNLJ's motion. He did not hold a further hearing or state his reasons on record.

Judge Oshiro concluded that: 1) a two-page letter of intent signed by Parnar on February 2, 1987, created a binding contract requiring payment to GNLJ of a fee amounting to 49% of the $2,075,000 Parnar judgement, or 2) in the alternative, based on *quantum meruit*, GNLJ had supplied legal services worth $1,016,371.35. *See* Appendix A to Parnar's Opening Brief on Appeal.

On September 13, 1989, Judge Oshiro executed, unchanged, GNLJ's proposed findings, conclusions and order of GNLJ, giving GNLJ $1,016,371.76 in attorneys' fees and costs. RA-XIII at 275-276. (Appendix B, Opening Brief). Even utilizing GNLJ's contested time sheets, introduced at the hearing as Exhibit #10 (*see* Appendix F hereto) the trial court awarded GNLJ one thousand dollars an hour, or forty thousand dollars a week, for their efforts in the Parnar case, which was "ready for trial" when they took over. 7/13/89 Tr. at 53.

On appeal, GNLJ did not seriously contest the facts as set forth in Parnar's opening brief as to the work it did or did not do for her at trial and on appeal, which is condensed above; *see* Parnar's opening brief on appeal at 1-11, GNLJ's answering brief at 1, and GNLJ's opening brief on appeal at 4. This case implicates the jurisdiction of the Hawaii courts to hear constested civil matters without affording a trial by jury to the litigant demanding same. It appears that jury trial would have been available in this case if the dispute over attorney fees was raised by way of a complaint instead of a motion.

ARGUMENT

I

THIS COURT CAN AND SHOULD REVIEW STATE COURT DECISIONS ON QUESTIONS OF STATE LAW WHEN THOSE COURTS MISINTERPRET THE DECISIONS OF THIS COURT WHILE RELYING ON THEM AS BINDING OR PERSUASIVE AUTHORITY.

This Court has repeatedly granted certiorari in cases analogous to the present one in which State courts have interpreted State law, relying upon Federal precedent but reaching results under state law which are inconsistent with that Federal precedent.

A recent example of this practice is *Pennsylvania v. Finley*, 481 U.S. 551 (1987), involving the duties of appointed counsel in State *habeas corpus* proceedings. Justice Stevens, dissenting on the basis that certiorari should not have been granted, noted:

> In this case, the Pennsylvania Superior Court stated that it was applying "*Pennsylvania law* concerning procedures to be followed when a court-appointed attorney sees no basis for appeal." . . . As for federal precedents, the court simply stated that state law in the area was "derived from" this Court's 1967 decision in *Anders v. California* 386 U.S. 738. . . . [T]here is no basis for concluding that the Pennsylvania Superior Court's decision to remand this case stemmed from its belief that the Federal Constitution required it to do so. (481 U.S. at 570. Emphasis added by Justice Stevens.)

The majority opinion, not disagreeing with Stevens' characterization of the posture of the case, stated that the Court had granted certiorari because

> The [Pennsylvania Superior] court held that "*Pennsylvania law* concerning procedures to be followed when a court-appointed attorney sees no basis for an appeal is *derived* from the seminal case of" *Anders v. California* 386 U.S. 738, 18 L.Ed.2d 493 (1967). (481 U.S. at 554. Emphasis added.)

Finley is consistent with *St. Martin Lutheran Church v. South Dakota* 451 U.S. 772, (1981) in which this Court held that South

Dakota's unemployment compensation tax statute was inapplicable to churches. The state tax was, however, modeled after Federal law, and this Court noted:

> The South Dakota Supreme Court's analysis depended entirely on its understanding of [federal law], and did not rest on any independent and adequate state ground. We therefore are at liberty to review the judgment, although literally, it concerns the construction of a state statute. While the South Dakota courts remain free to construe the State's own law differently, they deserve to be made aware of the proper and, here, significant interpretation of the intertwined federal law. 451 U.S., note 9 at 780. Similar results have been reached by the Court for as long as five decades; *see*, e.g., *Standard Oil Co. of California v. Johnson* 316 U.S. 481, 482-3 (1942).[4]

Thus, although the Court has stated that it may not grant certiorari if "the state court employed the decisions under the Federal Constitution merely as persuasive authority for its independent interpretation of the state constitution," *Minnesota v. National Tea Co.* 309 U.S. 551, 556 (1939), the above cases illustrate that this has not been the consistent practice for many years, if ever.

There are indeed very sound reasons for a more flexible approach when state law is grounded in Federal precedent, and especially where that was the reasoned intent. The fact that a court may have independent state grounds for its decision has never assured that those grounds are "adequate". Accordingly when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, the Court

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[4] The *Standard* decision and its relevance to the scope of this Court's review has been widely discussed. *See*, e.g., Redish, infra, notes 196-201 and accompanying text. Additional examples of this Court's decisions in which the Court concluded that reliance of the state on parallel federal decisions in construing law was sufficient to conclude that there were no "independent and adequate state grounds" for decision: *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982), *Zacchini v. Scripps-Howard Broadcasting Co.*, 438 U.S. 562, 568 (1977), and *Delaware v. Prouse*, 440 U.S. 648, 652 (1979).

presumes that there is no such ground. *Michigan v. Long*, 463 U.S. at 1032, 1041-42. The independent state grounds doctrine is eroded when state courts rely on a misunderstanding of Federal law, because, as one commentator has remarked,

> [W]here a state court's decision seems to contain independent state grounds, a change in the state court's underlying premise about federal law should not be dismissed as irrelevant to the court's understanding of state law. Matasar and Bruch, "Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine," (1986) 86 Columbia L.Rev. 1291, note 68 at 1308.

See, e.g., *Three Affiliated Tribes v. Wold Engineering* (N.D. 1985) 364 N.W.2d 98, 104, in which the state of North Dakota reversed its view of *state* law on remand from this Court "because of what the United States Supreme Court has taught us."

Moreover, as one authority has pointed out,

> Even if the state has voluntarily chosen to rely upon parallel federal law, simply as a means of enriching and improving its own, the state has much to gain by having the highest federal court directly comment upon the state court's interpretation of parallel federal law. Similarly, the federal interest may benefit from such review in several ways. Initially, it is conceivable that the Supreme Court might find persuasive the state court's normative discussion of the competing policies surrounding an unresolved federal issue. Moreover, inclusion of such cases in the category of decisions reviewable by the Supreme Court could provide the Court with a wider selection of fact situations in which to develop federal law. In short, in the tradition of cooperative federalism, both state and federal systems have much to gain from institution of a dialogue between the courts of both systems. . . . this dialogue would be fully consistent with the political theory of American federalism and would produce the substantial systemic benefits traditionally thought to flow from the process of inter-federal exchange. Redish, "Supreme Court

> Review of State Court 'Federal' Decisions: a Study in Interactive Federalism," (1985) 19 Ga.L.Rev. 861, 901.

The field of civil jury trials is a prime candidate for fruitful "inter-federal exchange" because, as will be discussed below, although the Seventh Amendment and the *Federal Rules of Civil Procedure* ("FRCP") are not directly applicable to the states, nonetheless many states view Seventh Amendment and FRCP caselaw as persuasive in construing provisions modeled after Federal law, and some states, including Hawaii, have explicitly incorporated Federal standards. The following segment of this brief will examine the "federalization" of state civil jury procedure in more detail.

II

ALTHOUGH THE SEVENTH AMENDMENT IS NOT ENFORCEABLE AGAINST THE STATES THROUGH THE FOURTEENTH AMENDMENT, NONETHELESS THE SEVENTH AMENDMENT CASES OF THIS COURT ARE BINDING AUTHORITY IN HAWAII AND AT LEAST TWO OTHER STATES, AND PERSUASIVE AUTHORITY IN MOST OF THE REMAINDER.

The Seventh Amendment of the United States Constitution provides in relevant part:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

Article I, Section 13 of the Hawaii Constitution (former Article I, Section 10, as amended with respect to the amount in controversy) provides in relevant part:

> In suits at common law where the value in controversy shall exceed five thousand dollars, the right of trial by jury shall be preserved.

The language of these provisions is obviously indistinguishable. In *Harada v. Burns* (1968) 50 Haw. 528, 445 P.2d 376, 379-80, the Hawaii Supreme Court, pointed out that

> The origin of this section is the seventh amendment of the United States Constitution which provides for jury trials for common law actions involving more than twenty dollars. Rule 38(a) of the Hawaii Rules of Civil Procedure provides that "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States or the Territory shall be preserved to the parties inviolate." This rule, adopted in 1953, was taken verbatim from the Federal Rules of Civil Procedure 38(a) except for the addition of the words "or the Territory."[5]

The Court specifically held:

> The seventh amendment jury trial right is not binding upon the states. The decision in the instant case [whether a jury trial is required because the issue is "equitable" or "legal"], therefore, rests on interpretation of the constitution of Hawaii, its statutes, and its rules of procedure. However, since the Hawaii constitutional provision and rule of procedure were patterned after the Federal Constitution and Rules, the interpretation of those provisions by the federal courts are deemed to be highly persuasive in the reasoning of this court.

How "highly persuasive" the decisions of this Court are deemed to be was stated in a note in *Harada*: the deliberations of the Hawaii Constitutional Convention

> clearly indicate that the language of article I, section 10 [now section 13] "preserved" the language of the United States Constitution in order to "preserve" also the judicial interpretation. (Id, note 1, 445 P.2d at 380).

The State Supreme Court has never reversed the position that the Hawaii Constitution "preserves" Federal judicial interpretations of the right to a jury trial in civil cases. To the contrary, as recently as April, 1991, the Hawaii Supreme Court has held that a trial court must make a finding when no jury trial has been held or waived "that a right of trial by jury of some or all of the issues

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[5] With respect to the specific language of Hawaii Rule of Civil Procedure 38(a), which has been subsequently changed, *see* note 5, infra.

did not exist under the Constitution or statutes of the United States or the State." *Kimball v. Lincoln* (No. 14653, April 5, 1991), slip opinion at 9.[6]

While few states have language both in their constitution and their rules of procedure which, like Hawaii's, are nearly identical to the language of the Seventh Amendment and FRCP Rule 38(a), nonetheless, the overwhelming majority have language which is functionally indistinguishable on its face from the Federal language. The relevant language from the constitutional provisions of all fifty states is summarized for the convenience of the Court in Appendix I hereto. Almost all the states' constitutions provide that the right to a jury trial in a civil case is in substance to be "preserved" or to "remain inviolate." Virtually every state has adopted the same fundamental interpretation of the varying language: that "legal" claims are entitled to jury trials, while "equitable" claims are not. The rationale is that the constitutional provisions neither expand nor contract but "preserve" historical rights, and that the British courts at law had juries whereas those at equity did not. *Kugler v. Bonner Pontiac-Buick, Opel, Inc.*, (N.J. 1972) 295 A.2d 385; *Carter v. State Road Dept.*, (Fla.1966) 189 So.2d 793.

There is little if any reason for distinguishing between interpretation of the Seventh Amendment and interpretation of their own

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[6] Although the word "Constitution" was substituted for the words "Seventh Amendment" effective July 1, 1972, it is clear for two reasons that no substantive change was made: (1) The Hawaii Supreme Court has never reversed the position taken in *Harada*; and (2) while no legislative history regarding the actual substitution exists, the legislative history of the contemporaneous revision of Hawaii's statutes and rules relating to civil procedure, supports the view that these were technical changes. Specifically, in amending Haw. Rev. Stat. Section 635-13 to provide that "the right of trial by jury is given by the Constitution or a Statute of the United States or this State or conferred by a rule of court," the drafters intended to conform with HRCP 38, and cited *Harada* as authority for the source of the jury trial right. Report of Committee on Coordination of Rules and Statutes, Vol. I, (September 1971).

Kimball clearly confirms this interpretation.

constitutions. The vast majority of states, after all, came to statehood from being British territories with British common law tradition (e.g. Virginia[7]), American territories with mandatory compliance with the Seventh Amendment (e.g. Hawaii), or territories of other states which had followed the Seventh Amendment pattern themselves (e.g. Maine). Consequently, it is consistent with history that interpretation of the various constitutional jury trial provisions should be consistent with the Seventh Amendment, despite the fact that, as the Hawaii Supreme Court correctly observed in *Harada*, the Seventh Amendment is not made mandatory upon the states through the Fourteenth Amendment. *Harada v. Burns*, supra, 445 P.2d at 380.

If anything, the exceptions prove the rule. The one state (Texas) whose decisional law makes the jury right equally applicable to law and equity, comes from a non-common law tradition and consequently had to create as well as "preserve" jury trial rights.[9] The one state (Louisiana) with no jury trial rights "preserved" in its Bill of Rights,[10] had no jury trial right to "preserve" from its French code law tradition.

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[7] Virginia's Art. I, Sec. 11, par. 2 provides in relevant part "That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred." The right to a jury in Virginia extends to cases analogous to those for which there was a jury right when the Virginia constitution was adopted, (common law but not equity) *Stanardsville Volunteer Fire Co. v. Berry* (Va. 1985) 331 S.E.2d 466.

The Maine constitution continues in effect jury trial rights under Massachusetts law at the time of adoption of the Maine constitution, *City of Portland v. DePaolo* (Me. 1987) 531 A.2d 669.

[9] Texas has a right of jury trial in equitable cases *San Jacinto Oil Co. v. Culberston* (Tex. 1907) 101 S.W. 197. This comes from Art. 5, Sec. 10 of the State Constitution; see *State v. Credit Bureau of Laredo, Inc.* (Tex. 1975) 530 S.W.2d 288. Texas obtained its independence from Mexico, so its constitution had to create rather than "preserve" jury trial rights. See Interpretive Commentary, West's Annotated Texas Constitution.

[10] Article I, Louisiana Constitution.

Many states, like Hawaii, explicitly rely upon the rulings of this Court in determining the scope of the right to a jury trial in civil cases. As examples:

Alabama Courts hold that its Art. I, Sec. 11[11] and the Seventh Amendment are not "materially different." *Poston v. Gaddis* (Ala.Civ.App. 1975) 335 So.2d 165, 167 cert denied 335 So.2d 169 (Ala.1976).

The Alaska Supreme Court relies upon U.S. Supreme Court "fair cross section" authority for determining the representativeness of civil juries, analogizing its constitutional provisions to Federal ones, *Malvo v. J.C. Penney Co.* (Alaska 1973) 512 P.2d 575.

In Delaware, the right to a civil jury trial is viewed as having been "modeled after the Seventh Amendment," and accordingly, the courts "will apply Seventh Amendment analysis and caselaw" in construing Art. I, Sec. 4 of its constitution[12] *Lacy v. Green* (Del. Super. Ct. 1981) 428 A.2d 1171, note 1 at 1176.

In Florida, the Supreme Court relies upon the Seventh Amendment decisions of this Court to determine the scope of the right to a jury trial in mixed equitable and legal proceedings *Hightower v. Bigoney* (Fla. 1963) 156 So.2d 501, 505. In determining whether there is a right to a jury trial, the courts look to the Seventh Amendment. *King Mountain Condominium Association v. Gundlach* (Fla. Ct. App. 1983) 425 So.2d 569, 571-71.

In Idaho, the Supreme Court has found the cases of this Court interpreting the Seventh Amendment to be "equally applicable" to interpretation of its Art. I, Sec. 7[13] *Neal v. Drainage Dist.No.2*, (Idaho 1926) 248 P. 22, 24.

With respect to Iowa's Art. I, Sec. 9,[14] the state Supreme Court has stated that "there is a nexus between interpretation of Iowa's

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[11] "That the right of trial by jury shall remain inviolate."

[12] "Trial by jury shall be as heretofore."

[13] "The right of trial by jury shall remain inviolate. . . "

[14] "The right of trial by jury shall remain inviolate. . . "

jury provision and the Federal provision," *Iowa Nat. Mut. Ins. Co. v. Mitchell* (Iowa 1981) 305 N.W.2d 724, 726, which justifies consistent construction of the two provisions, and indeed that "the intention of the two constitutional provisions is obviously the same," *Schloener v. Uhlenhopp* (Iowa 1946) 21 N.W.2d 457, 458.

Maryland's Declaration of Rights Art. 23, Par. 2[15] "may be identical in scope to the Federal right," *Franklin v. Mazda Motor Corp.* 704 F.Supp. 1325, 1335 (D. Md. 1989), citing Maryland caselaw which in turn relies upon Seventh Amendment cases in interpreting its own provision.[16]

> The Montana Supreme Court has "repeatedly held that the right guaranteed by the state Constitution[17] is the same as that guaranteed by the federal Constitution (Seventh Amendment) because the federal Constitution was the fundamental law of the territory at the time it was admitted into the Union as a state and the right as it then existed was preserved in the state Constitution." *Consolidated Gold and Sapphire Mining Co. v. Struthers* (Mont. 1910) 111 P.152, 155.

North Dakota courts have cited Seventh Amendment caselaw as binding or persuasive since before the state was admitted into the Union to the present day, *Gull River Lumber Co. v. Keefe* (Dakota 1889) 41 N.W. 743, 744, *Union State Bank v. Miller* (N.D. 1983) 335 N.W. 2d 807, 808, *Odden v. O'Keefe* (N.D. 1990) 450 N.W.2d 707, 708; like the Montana Supreme Court, that of North Dakota holds that its constitution[18] preserves rights

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[15] "The right of trial by jury of all issues of fact in civil proceedings in the several Courts of Law in this State. . . shall be inviolably preserved."

[16] *See*, also, *Pickett v. Haislip* (Md.Ct.Spec.App. 1967) 533 A.2d 287, 296, relying upon this Court's decisions on the scope of issues which should be determined by the jury in tort actions.

[17] present Art. II, Sec. 26 ("The right of trial by jury is secured to all and shall remain inviolate. . .")

[18] Present Art. I, Sec. 13: "The right of trial by jury shall be secured to all, and remain inviolate. . ."

under the Territorial law, which were the same as those under the Seventh Amendment, so that there is "no real difference" between the two constitutional provisions (Id).

Although Utah's constitutional language is substantially different from the Seventh Amendment,[19] nonetheless, the Utah Supreme Court relies upon the decisional law of this Court in construing its own constitution.[20]

West Virginia's Art. III, Sec. 13[21] is held to provide rights coextensive with the Seventh Amendment, *Criss v Salvation Army Residences* (W.Va. 1984) 319 S.E.2d 403, 406; the state constitutional provision "has essentially the same meaning as the Seventh Amendment to the U.S. Constitution." *Markey v. Wachtel* (W. Va. 1979) 264 S.E.2d 437, note 5 at 441.

These examples demonstrate that the Seventh Amendment decisions of this Court are nearly as influential in the field of state civil jury trials as if they were formally binding. Indeed, because of the link between state constitutions and territorial constitutions, the Seventh Amendment is in fact binding not only in Hawaii, but at least in Montana and North Dakota as well.

As it happens, the right to a jury trial in civil cases has been "preserved" not merely by the United States Constitution and the constitutions of many states, but by the Federal Rules of Civil Procedure. "Federalization" of civil procedure has proceeded

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[19] Art. I, Sec. 10: "In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."

[20] *See, e.g. Noble v. Noble*, (Utah 1988) 761 P.2d 1369, 1371 note 4, *First Security Bank of Utah v. Banberry Development Corp.*, (Utah 1989) 786 P.2d 1326, 1337 note 49, and *International Harvester Credit v Pioneer Tractor* (Utah 1981) 626 P.2d 418, 421, note 2.

[21] "In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved. . ."

apace, and many states have adopted the Federal Rules wholesale, with the intent of incorporating Federal civil procedure into the state courts.[22] The result is an additional basis on which many state courts have concluded that they must follow Federal precedent with regard to the right to a civil jury trial.

As noted above, Hawaii's Civil Procedure Rule 38(a), like FRCP Rule 38(a), explicitly incorporates the jury-trial requirements of the Seventh Amendment; consequently, the Hawaiian courts are bound by Seventh Amendment requirements even though the Seventh Amendment is not directly binding on any state; *see Harada* and *Kimball*, supra. Similarly explicit language is contained in Rule 38(a) of the North Dakota Rules of Civil Procedure.[23] Whether or not a state with "federalized" civil procedure literally incorporates Federal Constitutional principles, there is an overwhelming consensus that as a general matter,

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[22] For general discussions of the "federalization" of state procedure, *see* Subrin, "Federal Rules, local rules, and state rules: uniformity, divergence, and emerging procedural patterns," 137 U. Pa. L.Rev. 1999-2051 (1989), and Oakley and Coon, "The Federal Rules in states courts: a survey of state court systems of civil procedure," 61 Wash. L.Rev. 1367-1434 (1986).

[23] "The right of trial by jury as declared by the Constitution of the United States or by the Constitution of the State of North Dakota or as given by a statute of the United States or of the State of North Dakota shall be preserved to the parties inviolate."

Federal caselaw construing the Federal Rules will be viewed as "persuasive"[24] or "presumptively authoritative."[25]

In short, the decisions of this Court construing the Seventh Amendment are binding through constitution or rules of procedure in at least Hawaii, Montana and North Dakota, and are highly persuasive if not controlling in numerous other states.

III

GIVEN HAWAII'S INCORPORATION OF SEVENTH AMENDMENT PRINCIPLES INTO ITS LAW ON THE SUBJECT OF CIVIL JURY TRIALS, THIS CASE DEMONSTRATES A CLEAR MISUNDERSTANDING OF FEDERAL LAW.

As will be discussed, infra, inconsistency in interpretation of Federal Constitutional principles bearing on the jury trial right has created conflict among the decisions of State Courts of last resort and in the Federal Circuits. Inconsistent adjudication of this important Federal question presents a compelling ground for

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[24] *Crommelin v. Fain* (Ark. 1981) 403 So. 2d 177, 185; *Drickerson v. Drickerson* (Alaska 1976) 546 P. 2d 162, 167; *Duran v. Lamm* (Colo. 1984) 701 P. 2d 609, 613; *Allder v. Hudson* (Del. 1954) 106 A. 2d 769; *Brown v. Brown* (Fla. 1985) 432 So. 2d 704, 706; *Georgia International Life Insurance v. Boney* (Ga. 1976) 228 S.E. 2d 731, 737; *David Steed and Associates v. Young* (Idaho 1988) 766 P. 2d 717, 719; *Pennell v. Western and Southern Life Insurance Company* (Ind. 1985) 474 N.E. 2d 1042; *Maine Central Railroad Company v. Bangor and Aroostook Company* (Me. 1978) 395 A. 2d 1107; *White v. Labdell* (Mont. 1984) 678 P. 2d 637, 641; *Lewis v. Sisberg Academy & College* (NC. 1974) 208 S.E. 2d 404, 406; *Land Office Company v. Clapp-Thomssen Company* (ND. 1989) 442 N.W. 2d 401, 403; *Smith v. Johns Manville Corporation* (R.I. 1985) 489 A. 2d 336, 339; *Jerkins v. McKinney* (Tenn. 1976) 533 S.W. 2d 275, 281; *In re Estate of Cassidy* (Utah 1982) 656 P. 2d 1023, 1024; *Peneschi v. National Steel Corporation* (W.VA. 1982) 295 S.E. 2d 1, 13 note 12.

[25] *Otts v. Gray* (Ala. 1971) 255 So. 2d 26, 31; *Rollins Environmental Services Inc. v. Superior Court* (Mass. 1975) 330 N.E. 2d 814, 818.

grant of certiorari under Rule 10.1(b) and (c) of the Supreme Court Rules.

Because the Seventh Amendment speaks in terms of "preserving" the right to trial by jury in "suits at common law," the fundamental rule of construction for the Seventh Amendment is:

> In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791. *Dimick v. Schiedt* 293 U.S. 474, 476 (1935).

As a general principle, this Court held, Maintenance of the jury as a fact-finding body is of such importance and occupies such a firm place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. 293 U.S. at 486.

Questions arise constantly as the law evolves, however, as to what factual disputes in the modern age constitute "suits at common law." Almost two centuries after the phrase was coined, this Court in *Pernell v. Southall Realty* (1974) 416 U.S. 363, 374-75 described the criteria for determining what is a "suit at common law" as follows:

> The phrase "suits at common law" includes not only suits 'which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." *Parsons v. Bedford* 3 Pet 433, 447, & L.Ed. 732 (1830) . . . [The Seventh] Amendment requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty.

The conceptual split between "legal" and "equitable" claims has been accepted in virtually every state in the Union.[26] This principle, of course, does not solve the whole problem, because it must still be determined what is "legal" and what is "equitable" or "admiralty," and must also be decided how to address cases which raise mixed "legal" and "equitable" claims. This Court has also adopted some general principles for resolving problems which arise in mixed "legal" and "equitable" proceedings.

Take, for instance, the case of *Beacon Theatres v. Westover* (1959) 359 U.S. 500, 510-511, in which the plaintiff brought an "equitable" claim for declaratory and injunctive relief, and the defendant brought a "legal" counterclaim for damages. This Court held, as a matter of construction of the Seventh Amendment and Rule 38(a), FRCP, that a final determination of the equitable claims could not be made in a manner which would jeopardize the right to a jury trial on the legal claims. Generally,

> [O]nly under the most imperative circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.

This Court has repeatedly held that when a claim is based upon contract, the parties have

> a right to have the jury determine not only whether the contract has been breached and the extent of the damages if any but also just what the contract is,

even if the suit is in the form of a complaint for injunction and an equitable "accounting," and equitable defenses are raised. *Dairy Queen v. Wood* 369 U.S. 469, 479 (1962). This Court held, generally, that the Seventh Amendment and *Beacon Theatres* require "that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury," and that this rule

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[26] As noted above, the only exception appears to be Texas, which does not come from a common law tradition and had no common law right to jury trials to "preserve," so created a general civil jury trial right.

applies even if "the trial judge chooses to characterize the legal issues as 'incidental' to equitable issues." (Id, 369 U.S. at 473).

In this case, as in *Dairy Queen*, there was a dispute over "just what the contract was" and indeed whether, as in *Dairy Queen*, there was an oral modification of the contract. The fact that what was sought here was enforcement of an equitable lien can no more deprive Ms. Parnar of a right to a jury trial on the contractual issues than could the fact that what was sought by the moving party in *Dairy Queen* was an "accounting."

This Court has decided virtually the same issue as was involved in the present case, under virtually the same facts: whether or not the client in a dispute over attorney fees may be denied the right to a jury trial merely because as a matter of form the question has arisen in an "equitable" context. In *Simler v. Conner* 372 U.S. 221, 223 (1963), the Court, having held that the issue of whether a case is "legal" or "equitable" for Seventh Amendment purposes is a matter of Federal law even though it arises under state law, summarized the facts and law on the subject as follows:

> On the question whether, as a matter of federal law, the instant action is legal or equitable, we conclude that it is "legal" in character. The record discloses that the controversy between the petitioner and respondent in substance involves the amount of fees petitioner, a client, is obligated to pay respondent, his lawyer. Petitioner admits his obligation to pay a "reasonable" fee under a contingent fee retainer contract stipulating that reasonableness may be set in a court trial. Respondent relies on a subsequent contract specifying 50% of the recovery, under certain circumstances, as the amount of the fee. Petitioner counters that the latter contract is the product of fraud and overreaching by the lawyer.
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> The case was in its basic character a suit to determine and adjudicate the amount of fees owing to a lawyer by a client under a contingent fee retainer contract, traditionally a "legal" action. The fact that the action is in form [equitable] should not obscure the essentially legal nature of the action. The questions involved are traditional common-law issues

which can and should have been submitted to a jury. (Citations omitted.)

The facts in *Simler* are stunningly similar to those in the present case, and the holding is dispositive, given the rule of the Hawaii Supreme Court that Article I Section 13's jury-trial provisions " 'preserve'. . . the judicial interpretation" of the Seventh Amendment (*Harada*, supra).

The state courts, in ruling on issues of attorney fees claims and imposition of attorney charging liens, while generally recognizing the constitutional basis of the jury trial right and the constitutional distinction between "legal" and "equitable" claims, have come to differing conclusions.[27] Of particular significance in the

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Arizona

Right to jury trial on attorney fees *Flieger v. Ash* (Ariz.Ct.App. 1980) 624 P.2d 1295.

Colorado

"[T]he burden is upon the attorneys to prove that the arrangements were fairly and openly arrived at and to prove the reasonable value of the services rendered [which] are questions of fact to be determined by the jury." *Taylor v. Barnhill* (Colo. 1970) 470 P.2d 902, 904.

Florida

Existence of an attorney fees contract is to be submitted to the jury, *Milton Kelner v. 610 Lincoln Road, Inc.* (Fla. 1976) 328 So.2d 193, 195)

Idaho

Enforcement of attorneys lien is "equitable," with no right to jury trial (Case had no legal counterclaim) *Skelton v. Spencer* (Idaho 1981) 25 p.2d 1072. *Neal v. Drainage Dist.No. 2* (1926) 248 P. 22, 24 - attorneys fees action, error not to allow to go to jury, citing Seventh Amendment. Where the attorney seeks to impose a charging lien and the client questions "whether fees have been earned and properly billed," the latter questions must be submitted to a jury, *Jarman v. Hale* (Idaho 1986) 731 P.2D 813, 818.

Minnesota

Enforcement of attorneys lien is equitable—no right to jury trial, *Village of New Brighton v. Jamison* (Minn. 1979) 278 N.W.2d 321. Accord *Blazek v. North American Life Casualty* (Minn. 1963) 121

present case is the law of Idaho, which as noted above, interprets

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N.W.2d 339. In a suit to enforce attorneys lien, mere fact that attorneys fees rather than some other services involved did not exempt case from jury trial *Westerland v. Peterson* (Minn. 1923) 197 N.W.2d 110.

Missouri

Proceeding to establish amount of attorneys lien is equitable even though involves contract issues, *Young v. Levine* (Mo. 1930) 31 S.W.2d 978. In suit to establish and enforce attorneys lien, with clients contesting reasonableness of the fee, clients not entitled to jury trial *Fein v. Schwartz* (Mo.Ct.App. 1966) 404 S.W.2d 210.

Nebraska

Existence and enforcement of attorneys lien is equitable, *Kleager v. Schaneman* (Neb.1982) 322 N.W.2d 659.

New Jersey

Enforcement of attorney lien has jury trial right *Artale v. Columbia Ins. Co.* (N.J. 1932) 162 A. 585.

Oklahoma

Enforcement of attorneys lien where not seeking personal judgment, defendant is not entitled to jury trial, *City of Barnsdall v. Cornutt* (Okla. 1946) 174 P.2d 596, but "In an action brought for attorney fees, the issue as to what would be a reasonable fee for services rendered is an issue of fact to be determined by the jury," *Sarkey v. Haas,* (Okla. 1965) 402 P.2d 894, 899, and "In an action for a specified attorneys' fee, where the issue is joined as to what is a reasonable fee, such issue is for the jury, notwithstanding the plaintiff may pray that an equitable lien be decreed against defendant's land." *Wolfe v. Campbell* (Okla. 1924) 230 P. 506.

Oregon

The reasonableness of attorney's fees was a question for the jury. *Cox v. Alexander,* (Or. 1897) 30 Or. 438, 46 P. 794. Failure to submit the issue of reasonable value to the jury in an action to recover in quantum meruit was erroneous. *Whitten v. Griswold,* (Or. 1911) 60 Or. 318, 118 P. 1018.

Rhode Island

Existence of an attorney fees contract is a jury question, *Jacobs v. United Electric Rys. Co.* (R.I. 1924) 125 A. 286, 288.

Texas

Jury trial right on attorney fee claim in mandamus action *Accounting Search Consultants, Inc. v. Christensen* (Tex.Ct.App. 1984) 678 S.W.2d 593.

its jury trial right as identical to that protected by the Seventh Amendment. In *Jarman v. Hale* (Idaho 1986) 731 P.2d 813, 818, the Idaho Supreme Court reached the precise issue presented by the present case, and, relying upon *Simler*, concluded that the contract and "reasonableness" issues in an attorney fees dispute must be submitted to a jury even though they arise in the context of an equitable proceeding for imposition of a charging lien. *Jarman* and *Simler* were the authorities relied upon by Petitioner at trial, and rejected by the trial court. (Plaintiff's Memorandum in Opposition to Motion for Partial Enforcement of Attorneys' Lien, RA-XII, at 93).

In the closely analogous area of mechanics' liens, most state courts which have considered the issue have held that where an equitable proceeding is brought to impose or enforce a mechanics lien, counterclaims raising contractual issues or claims for damages must be submitted to a jury. Of particular note are the rules in Florida, Idaho, Iowa, Maryland and West Virginia, all of which, as noted above, are states which interpret their own constitutional civil jury right as essentially the same as the Seventh Amendment, and all of which hold that in a suit to impose or enforce a mechanics' lien, counterclaims for breach of contract or damages must be submitted to a jury. Additionally, New York courts, relying explicitly upon *Dairy Queen* and *Beacon Theatres*, supra, have reached the same conclusion.[28]

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Florida

In suit on mechanics lien, defendant in compulsory counterclaim for breach of contract is entitled to jury trial, *Construction Systems and Engineering v. Jennings Construction* (Fla.Dist.Ct.App. 1982) 413 So.2d 1236.

Idaho

In case of suit on mechanics lien with counterclaim for breach of contract, counterclaim jury is advisory if lien held valid, mandatory if lien held invalid. *Mitchell v. Flandro* (Idaho 1972) 506 P.2d 455.

Illinois

Defendant is entitled to jury trial on legal counterclaim to equitable proceeding to enforce mechanics lien, *Power Electric Contractors v. Maywood-Proviso State Bank* (Ill.App.Ct. 1978) 377 N.E.2d 142.

In summary, Hawaii appears in the present case to stand alone among those states which have incorporated the Seventh Amendment as a rule of construction into their own rules of civil procedure or constitutional jury-trial rights, in denying the right to a jury trial in a lien-enforcement proceeding in which there are "legal" defenses.

Indiana

Legal counterclaims to equitable mechanics lien enforcement may be decided by equity without jury. *Claise v. Bernardi* (Ind.Ct.App. 1980) 413 N.E.2d 609.

Iowa

An action to enforce a mechanics lien is tried to the court but counterclaim for breach of warranty is tried to jury, *Moore's Builder and Contractor v. Hoffman* (Iowa Ct.App. 1967) 409 N.W.2d 191.

Maryland

Enforcement of mechanics lien is triable to court, but counterclaim for breach of contract is triable to jury as of right *Kahle v. McDonough Builders, Inc.* (Md. App. 1990) 582 A.2d 557.

Missouri

Suit to establish mechanics lien with counterclaim for damages requires jury trial *Suburbia Pools v. Fischer* (Mo.Ct.App 1983) 661 S.W. 2d 823.

New York

Where answer to equitable petition for foreclosure of mechanics lien asserts breach of contract, there is a right to jury trial on the breach issue, *Stokes v. Johnson* (N.Y. App.Div. 1988) 526 N.Y.S. 2d 27. Accord when breach counterclaim raised, citing *Dairy Queen* and *Beacon Theatres, Cowper v. Buffalo Hotel Development Venture* (N.Y. App.Div.1984) 471 N.Y.S. 2d 913, 916, reversing *Cowper v. Buffalo Hotel Development Venture* (N.Y.Sup.Ct. 1983) 466 N.Y.S. 2d 568, which held no right to jury trial on legal counterclaim where combined with equitable counterclaim. In suit on foreclosure of mechanics lien, either side is entitled to jury trial on counterclaim for breach of contract *DiMenna v. Cooper and Evans Co.* (N.Y.App.Div. 1913) 140 N.Y.S. 680.

Ohio

Defendant in foreclosure on mechanics lien has right to jury trial both on amount of the lien when contested and on a counterclaim for breach

In briefing this issue, the parties below did not discuss Hawaiian caselaw except for *Harada v. Burns,* supra, and chiefly relied upon differing interpretations of *Simler,* supra. Respondent relied in particular upon *Petition of Rosenman & Colin* 850 F.2d 57, 60-61 (2nd Cir. 1988), in which the Court of Appeals held that the client is not entitled to a jury trial on contract issues in a proceeding brought by an attorney to enforce an attorney's charging lien. Ironically, the Court of Appeals relied upon a district court decision which in turn relied upon a 1901 case under the

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of contract, *Carl Sectional Home, Inc. v. Key Corp.* (Ohio Ct.App. 1981) 439 N.E. 2d 915.

Oklahoma

Waiver of personal judgment deprives defendants of jury trial in mechanics lien case, *Joe Brown Co. Inc. v. Best* (Okla. App. 1979) 601 P.2d 755. If issue joined as to indebtedness, either party entitled to jury trial *Scott v. Jones-Everett Machine Co.* (Okla. 1921) 200 P. 168.

Rhode Island

Filing of legal counterclaim in mechanics lien case doesn't entitle defendant to jury trial (R.I. 1990) 572 A.2d 1102.

South Dakota

No right to demand jury trial in suit to enforce mechanics lien despite fact that personal judgment could be rendered. *Gull River Lumber Co. v. Keefe* (S.D. 1889) 41 NW 743.

West Virginia

Right to jury trial on counterclaim for breach of contract on enforcement of mechanics lien, *Ballengee v. Kirby* (W.Va. 1978) 245 S.E.2d 847. To deny a jury trial on a breach-of-contract counterclaim to an enforcement of mechanics lien "denies a fundamental constitutional right," and the judgment is "void," *State ex rel, West Virginia Truck Stops, Inc. v. McHugh* (W.Va. 1977) 233 S.E.2d 729.

Wisconsin

Unless an equitable claim (including mechanics lien foreclosure) is brought in bad faith, the defendant is not entitled to jury trial on related legal claims or counterclaims, *Tri-State Home Improvement Co. Inc. v. Mansavage* (Wis.1977) 253 N.W.2d 474, 479. A defendant may be entitled to a jury trial on a mandatory legal counterclaim to an equitable claim, but waives right to jury on filing a noncompulsory counterclaim; *Mortgage Associates, Inc. v. Monona Shores, Inc.* (Wis. 1970) 177 N.W.2d 340, 345.

New York Constitution, *In Re King* (N.Y. 1901) 60 N.E. 1054, 1056; *see Rosenman et al v. Richard* 656 F.Supp. 196, 197-8 (S.D. N.Y. 1987). In any event, there is contrary authority from the DC Circuit: *National Life Insurance Co. v. Silverman* 454 F.2d 899, 905-6 (D.C. Cir. 1971), which held that the defendant in an action to foreclose a mortgage lien is entitled to a jury trial on a counterclaim for damages.

Simler, *Dairy Queen*, and *Beacon Theatres*, taken together, clearly require the result that has been reached in the attorney-lien context in Idaho, in the mechanics'-lien context in Florida, Idaho, Iowa, Maryland, New York and West Virginia, and in the mortgage-lien context in the D.C. Circuit. To hold otherwise would be clearly inconsistent with the "firm place in our history and jurisprudence" of the civil jury trial, *Dimick*, supra.

CONCLUSIONS

Although the Seventh Amendment is not incorporated into the Fourteenth Amendment due process clause, it *has* been incorporated in practice into the state constitutions of a number of states, including that of Hawaii. Similarly, although the jury trial right of FRCP Rule 38(a) is not directly enforceable against the states, that rule has been incorporated into the procedural rules of numerous states, including Hawaii.

The states which rely upon Federal precedent in this area, either as persuasive or as binding authority, have generally concluded that lien enforcement, although "equitable," cannot be litigated completely without a jury where there are inextricably intertwined "legal" issues. Hawaii, as illustrated by the present case, is an exception. Accordingly, this case meets the criteria of Supreme Court Rules 10.1(b) and 10.1(c), and certiorari should be granted.

An additional and very important reason for granting certiorari in this case is to clarify confusion which has arisen over the "federal question" jurisdiction of this Court. Specifically, Petitioner submits that the Court should grant certiorari to resolve the question of when if ever the state grounds for decision are "adequate" when a state court, resolving a question of state law,

relies upon incorrectly understood Federal precedent to reach result inconsistent with that precedent.

Independently, in this case, the size of the award ($1000 an hour) and the manner in which the award was considered and approved (over denial of a trial request, without giving reasons for the size of the award and assuming jurisdiction to consider the award on the basis of a motion, a procedure which is not authorized by the Hawaii statutes and rules) should be held to constitute a violation of due process and equal protection clauses of the Fifth Amendment in that they denied fundamental fairness to the appellant.

For these reasons, Petitioner prays that the writ be granted.

Date: April 30, 1991

Respectfully submitted.

EPHRAIM MARGOLIN
NICHOLAS C. ARGUIMBAU

By: EPHRAIM MARGOLIN
Attorneys for Petitioner

Appendix I

Opinion of the Hawaii Supreme Court

No. 14203

In the Supreme Court of
the State of Hawaii

Eugenie Parnar,
Plaintiff-Appellant,
Cross-Appellee,

vs.

Green, Ning, Lilly & Jones,
Movant-Appellee,
Cross-Appellant

and

Americana Hotels, Inc.,
Flagship International, Inc.,
Mark E. Liquori
Defendants.

Civ. No. 52878

Appeal from The Judgement and Order Granting Green, Ning, Lilly & Jones Motion for Enforcement of Attorneys' Lien Filed September 13, 1989

First Circuit Court

Honorable Robert G. Klein
Honorable Philip T. Chun
Honorable Hiroshi Oshiro,
Judges

[Filed]
[1991 Jan—9 PM 1:55]
[L. Nakagawa]
[Clerk Supreme Court]

MEMORANDUM OPINION

Plaintiff-Appellant and Cross-Appellee, Eugenie Parnar, (Parnar) appeals from the Judgment and Order Granting Green, Ning, Lilly & Jones' (GNLJ) Motion for Enforcement of Attorneys' Lien filed September 13, 1989.

Parnar asserts that the trial court erred in: (1) determining it had jurisdiction to award attorneys' fees; (2) denying the request for a jury trial; (3) awarding the attorneys' fees according to the contingency fee contract, when it was obtained under duress or fraud, terms were unexplained, or the fee was out of proportion to the value of services rendered; (5) awarding fees according to the contingency fee contract when the client discharged the attorney before the end of litigation; and (6) finding, in the alternative, the fee was reasonable under quantum meruit.

Movant-Appellee and Cross-Appellant, (GNLJ), cross-appeals on two grounds: (1) the trial court erred in denying their request for attorneys' fees under Hawaii Revised Statute (HRS) section 607-14; and (2) the trial court erred in extending Parnar's time to appeal.

On October 24, 1977, Parnar brought a wrongful termination suit against Americana Hotels, Inc. and Flagship International, Inc. (Americana) in the First Circuit Court. On January 30, 1987, the eve of trial, Parnar discharged the law firm of Dave Schutter and hired the law firm of Green, Ning, Lilly & Jones on a contingency fee basis. Parnar signed a fee agreement with GNLJ on February 2, 1987. The agreement provided GNLJ would represent Parnar in the trial and potential appeal of her case against Americana. In return, GNLJ would receive a contingency fee of 33.3% through trial and 40% after the filing of a notice of appeal, and GNLJ's fee would not be offset by any fees owed to prior attorneys in the case.

GNLJ tried the case. After the jury awarded Parnar $2,070,000 in damages, GNLJ successfully represented her in Americana's appeal to this Court. Americana moved for a stay of judgment pending review by the United States Supreme Court and this Court limited the stay to the amount of the punitive award of $1,500,000.

On November 8, 1988, Parnar discharged GNLJ. On July 3, 1989, the United States Supreme Court denied the Petition for Writ of Certiorari.

After a careful review of the record, we conclude that the trial court did not err in enforcing the fee agreement. We further conclude that, the trial court did not err in finding the fees requested by GNLJ to be reasonable.

As to the other grounds asserted by Parnar and by GNLJ on their cross-appeal, we find no reversible error.

Affirmed.

Dated: Honolulu, Hawaii, January 9, 1991.

Peter Van Name Esser
(Willard J. Peterson with
him on the brief) for
plaintiff-appellant,
cross-appellee.

[Herman Lum]
[Yoshimi Hayashi]
[James Wakatsuki]
[James S. Burns]
[Walter M. Heen]

Jerry M. Hiatt
(Crystal K. Rose with
him on the brief of Bays,
Deaver, Hiatt, Kawachika,
Lezak and Kodani) for
movant-appellee,
cross-appellant.

Appendix II

No. 14203

In the Supreme Court of
the State of Hawaii

Eugenie Parnar,
Plaintiff-Appellant,
Cross-Appellee,

vs.

Green, Ning, Lilly & Jones,
Movant-Appellee,
Cross-Appellant

and

Americana Hotels, Inc.,
Flagship International, Inc.,
Mark E. Liquori
Defendants.

Civ. No. 52878

Appeal from The Judgment and Order Granting Green, Ning, Lilly & Jones Motion for Enforcement of Attorneys' Lien Filed September 13, 1989

First Circuit Court

Honorable Robert G. Klein
Honorable Philip T. Chun
Honorable Hiroshi Oshiro,
Judges

Notice of Entry of Judgment on Appeal

To: The Honorable Presiding Judge of the Circuit Court of the First Circuit, State of Hawaii

PLEASE TAKE NOTICE that the Supreme Court of the State of Hawaii has entered the following Judgment on Appeal:

"Pursuant to the Memorandum Opinion of the Supreme Court of the State of Hawaii entered January 9, 1991, the

Judgment and Order Granting Green, Ning, Lilly & Jones' Motion for Enforcement of Attorneys' Lien filed on September 13, 1989, is affirmed. "

DATED: Honolulu, Hawaii January 31, 1991

By the Court:

L. NAKAGAWA

Clerk

The form of the foregoing Notice is approved and IT IS ORDERED that the same issue forthwith.

DATED: Honolulu, Hawaii January 31, 1991

JAMES H. WAKATSUKI

Justice

Appendix III

Excerpts from State Constitutional Provisions Regarding Civil Jury Trials

Alabama

Art. I, Sec. 11: "That the right of trial by jury shall remain inviolate."

Alaska

Art. I, Sec. 16: "In civil cases . . .the right of trial by a jury of twelve is preserved to the same extent as it existed at common law. . ."

Arizona

Art. 2, Section 23: "The right of trial by jury shall remain inviolate. . ."

Arkansas

Art. 2, Sec. 7: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law. . ."

Colorado

Art.2, Sec. 23: "The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts. . ., may consist of less than twelve persons. . ."

Connecticut

Art. 1, Sec. 19: "The right of trial by jury shall remain inviolate. . ."

Delaware

Art. I, Sec. 4: "Trial by jury shall be as heretofore."

Florida

Art. I, Sec. 22: "The right of trial by jury shall be secure to all and remain inviolate. . ."

Georgia

Art. I, Sec. i Par. XI (a): "The right to trial by jury shall remain inviolate. . ."

Hawaii [text provided elsewhere herein]

Idaho

Art. I, Sec. 7: "The right of trial by jury shall remain inviolate. . ."

Illinois

Art. 1, Sec. 13: "The right of trial by jury as heretofore enjoyed shall remain inviolate."

Indiana

Art. 1, Sec. 20: "In all civil cases, the right of trial by jury shall remain inviolate."

Iowa

Art. I, Sec. 9: "The right of trial by jury shall remain inviolate. . ."

Kansas

Bill of Rights Sec. 5: "The right of trial by jury shall be inviolate."

Kentucky

Bill of Rights Sec. 7: "The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate. . ."

Louisiana

[The Bill of Rights is Article I. Apparently there is no explicit constitutional civil jury trial right.]

Maine

Art. I, Sec. 20: "In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced. . ."

Maryland

Declaration of Rights Art. 23: ". . . The right of trial by jury of all issues of fact in civil proceedings in the several Courts of Law in this State. . . shall be inviolably preserved."

Massachusetts

Declaration of Rights Art. XV: "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred. . ."

Michigan

Art. 1, Sec. 14: "The right of trial by jury shall remain. . ."

Minnesota

Art. 1, Sec. 4: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law. . ."

Mississippi

Art. 3, Sec. 30: "The right of trial by jury shall remain inviolate. . ."

Missouri

Art. 1, Sec. 22(a): "That the right of trial by jury as heretofore enjoyed shall remain inviolate. . ."

Montana

Art. II, Sec. 26: "The right of trial by jury is secured to all and shall remain inviolate. . ."

Nebraska

Art. I, Sec. 6: "The right of trial by jury shall remain inviolate. . ."

Nevada

Art. 1, Sec. 3: "The right of trial by jury shall be secured to all and remain inviolate forever. . ."

New Hampshire

Part I, Art. 20: "In all controversies concerning property, and in all suits between 2 or more persons except those in which another practice is and has been customary and except those in which the value in controversy does not exceed $1500 and no title to real estate is involved, the parties have a right to a trial by jury. . ."

New Jersey

Art. 1, Sec. 9: "The right of trial by jury shall remain inviolate. . ."

New Mexico

Art. II, Sec. 12: "The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate. . . ."

New York

Art. I, Sec. 2: "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever. . ."

North Carolina

Art. I, Sec. 25: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities

of the rights of the people, and shall remain sacred and inviolable."

North Dakota

Art. I, Sec. 13: "The right of trial by jury shall be secured to all, and remain inviolate. . ."

Ohio

Art. 1, Sec. 5: "The right of trial by jury shall be inviolate. . ."

Oregon

Art. 1, Sec. 17: "In all civil cases the right of Trial by Jury shall remain inviolate."

Pennsylvania

Art. 1, Sec. 6: "Trial by jury shall be as heretofore, and the right thereof remain inviolate. . ."

Rhode Island

Art. 1, Sec. 15: "The right of trial by jury shall remain inviolate. . ."

South Carolina

Art. I, Sec. 14: "The right of trial by jury shall be preserved inviolate. . ."

South Dakota

Art. VI, Sec. 6: "The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy. . ."

Tennessee

Art. 1, Sec. 6: "That the right of trial by jury shall remain inviolate. . ."

Texas

Art. I, Sec. 15: "The right of trial by jury shall remain inviolate. . ."

Art. V, Sec. 10: "In the trial of all causes in The District Courts, the Plaintiff or Defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be empaneled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum, and with such exceptions as may be prescribed by The Legislature."

Utah

Art. I, Sec. 10: "In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."

Virginia

Art. I, Sec. 11, par. 2: "That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. . ."

Washington

Art. 1, Sec. 21: "The right of trial by jury shall remain inviolate. . ."

West Virginia

Art. III, Sec. 13: "In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved. . ."

Wyoming

Art. 1, Sec. 9: "The right of trial by jury shall remain inviolate in criminal cases. A jury in civil cases and in criminal cases where the charge is a misdemeanor may consist of less than twelve (12) persons but not less than six (6), as may be prescribed by law. . ."

Supreme Court, U.S.
FILED
MAY 17 1991
OFFICE OF THE CLERK

No. 90-1703

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EUGENIE PARNAR,

Petitioner,

v.

GREEN, NING, LILLY & JONES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE JUDGMENT OF THE HAWAII SUPREME COURT

KE-CHING NING*
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**Counsel of Record*

Attorneys for Respondent

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Hawaii Supreme Court decision is inconsistent with any ruling of this Court under the Seventh Amendment, when the Seventh Amendment has no binding effect on the states.

2. Whether the Hawaii Supreme Court decision is based on adequate state grounds, including the tardiness and limited scope of Petitioner's jury demand.

3. Whether this Court should exercise jurisdiction to review an unpublished memorandum decision which has no precedential value or general importance.

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STATEMENT OF FACTS

A. Findings of the Trial Court as Affirmed by the Hawaii Supreme Court

The following is a summary of the trial court's Findings of Fact and Conclusions of Law dated September 13, 1989 (Appendix A), and is a quotation of the Statement of Facts in Respondent's Opening Brief in the Hawaii Supreme Court appeal. The findings are supported by substantial evidence from the trial record, references to which are shown in parentheses.

Petitioner's original lawsuit was against her employer for wrongful termination. Before coming to Respondent, Green, Ning, Lilly & Jones, she had been represented by three previous sets of lawyers. She had made a contingency fee agreement with each of them. They were: Boyce Brown (Tr. July 12, 1989, p. 64), Susan Ichinose (*Id.* p. 65), and David Schutter (*Id.* pp. 69-70). Each of the three fee agreements called for a one-third contingency fee. The agreement with Mr. Brown escalated to 40% on retrial; the agreement with Mr. Schutter called, in addition, for an escalation to 45% in case of remand after an appeal (*Id.* pp. 73-74). Mr. Schutter's agreement also authorized him to accept any settlement at or over $200,000.00 (*Id.* p. 76).

Trial of the wrongful termination case was scheduled to commence in January, 1987. Settlement negotiations shortly before trial yielded an offer from the defendants of $115,000.00 (*Id.* p. 78). Mr. Ferrera, of the Schutter office, testified that Petitioner authorized a settlement at $125,000.00 (Tr. July 13, 1989, p. 70). This was confirmed by Petitioner (Tr. July 12, 1989, p. 81). When defendants would not agree to the higher number, Petitioner's attorneys offered to

reduce their fees so that she would net the amount she wanted. Nevertheless, she refused to settle (Tr. July 13, 1989, p. 51).

Mr. Schutter then moved before Judge Waldorf, the settlement and trial judge, to have Petitioner declared incompetent, so a guardian could be appointed to settle for her (Tr. July 12, 1989, p. 110). She began to look for another lawyer. On Thursday, January 29, Judge Waldorf allowed her 24 hours to obtain new counsel (Tr. July 6, 1989 p. 20). At this time, trial was scheduled to commence the following week (*Id.* p. 26).

Petitioner's long-time friend, Larry Zenker, also an attorney, recommended Michael Lilly (Tr. July 7, 1989, pp. 24, 47). She spoke with Mr. Lilly on Thursday, and made an appointment to meet with him on Friday morning (Tr. July 6, 1989, p. 20). They met for about an hour, and orally agreed that Mr. Lilly would represent her in the upcoming trial on a contingency fee basis that was later reduced to writing (Tr. July 6, 1989, pp. 24-5). She showed that she was "a woman who had a very clear grasp of the facts in her case, a very competent woman, determined woman" (*Id.* p. 24). That afternoon, Mr. Lilly entered an appearance for her, and obtained a continuance of the trial to mid-April (*Id.* pp. 31-2). Also on that day, Judge Waldorf denied Mr. Schutter's motion to find Petitioner incompetent (*Id.* p. 111).

On Monday, February 2, Petitioner and Mr. Lilly met again. Mr. Lilly showed her a draft fee agreement, and went over every term with her (*Id.* pp. 104-105). When she indicated her understanding and agreement, he had it typed in final form, and she

signed it (*Id.* pp. 33-34). The agreement provides, in pertinent part:

> "You have requested the representation of our law firm in matters involving the termination of your employment with Americana Hotels, Inc. *This letter does not cover any other representation we may undertake on your behalf.*"

(emphasis added) The letter provided for a one-third contingent fee "up to and through trial, and a fee of 40% after a notice of appeal is filed". It also provided that "*We will have a lien on all proceeds for our fees*" and "Should you at any time wish to terminate our services, you may do so; *however, we will be entitled to lien for our contingency fee on any amounts you collect during our representation of you or afterward*" (Respondent's Exhibit 3. Tr. July 6, 1989, p. 34).

In connection with Petitioner's desire to sue Mr. Schutter for malpractice, Mr. Lilly made clear to her that he would not represent her in such an action (Tr. July 6, 1989, pp. 41-2).

Before she signed the fee agreement, Petitioner had been given names of other lawyers by Mr. Zenker. She was free to retain another attorney, and she had telephoned at least one (Tr. July 7, 1989, pp. 35-36; Tr. July 12, 1989, pp. 84, 93).

Respondent took the case on a contingency despite the risks of a total loss or low recovery, and despite the recommendation by Mr. Schutter that Petitioner accept the settlement offer of $115,000. The novel nature of the case made it a high-risk case (Tr. July 6, 1989 pp. 101-02).

Mr. Lilly tried the case and obtained a verdict in April, 1987, of $2,070,000.00. This was and is the highest award for such a case in Hawaii; Petitioner was "ecstatic" at the result (*Id.* p. 59).

The defendants then appealed that verdict to the Hawaii Supreme Court (*Id.* p. 58). Respondent represented Petitioner through the entire appeal process until the Hawaii Supreme Court affirmed the verdict. Respondent then successfully defended the Defendants' Motion for Reconsideration before the Hawaii Supreme Court (*Id.* p. 68). Defendants then filed a petition for writ of certiorari of the punitive damages to the U.S. Supreme Court (*Id.* p. 69). At that point, the portion of the verdict which was not affected by the stay pending the U.S. Supreme Court appeal was placed in Respondent's trust account (*Id.* p. 70).

On November 8, 1988, despite having achieved a total victory through Respondent's efforts, Petitioner terminated Respondent's services and refused to pay them a penny for their work, not even their out-of-pocket expenses paid on her behalf (Tr. April 24, 1989, p. 7). Her termination letter gave no reason for her action (Tr. July 6, 1989, p. 78). But for the letter, Respondent would have continued with her case to its conclusion at the U.S. Supreme Court (*Id.* pp. 79-80).

During the nearly two years that Respondent worked for her, Petitioner never questioned her fee agreement, except for one inquiry about whether a step up to 40% was reasonable merely on the filing of a notice of appeal (*Id.* p. 63). In order to meet her concern, Mr. Lilly drafted an amendment to the fee agreement to provide for a graduated scale, in-

creasing until the work on the appeal was done. Petitioner never returned the document, and cancelled the meeting set to discuss it; thus, the fee agreement was never amended (*Id.* pp. 63-64). In fact, Respondent had to defend the whole appeal to the end, as well as defeat the Motion for Reconsideration (*Id.* pp. 67-68, 71-72). Thus, the issue of whether the step up to 40% was earned became moot.

When no payment with respect to the outstanding fees was received after several months, Respondent finally filed a Motion for Partial Enforcement of Attorneys' Lien on April 13, 1989 (R. Vol. 12, 30-85).[1] Petitioner put up a vigorous defense. She asserted that she had signed the fee agreement under duress and that Respondent should have also sued and filed disciplinary charges against Mr. Schutter and filed disciplinary charges against Judge Waldorf, both of whom had urged her to settle her case. However, she made no counterclaim and she called no experts on the reasonableness of the fee.

Petitioner's various assertions were contradicted by the specific disclaimer in the fee agreement of any representation other than the wrongful termination suit. Her primary position that she had been duped into the fee agreement was fabricated after the fact to evade liability: she waited nearly two years, and only after she received all the benefits of Respondent's work to raise that defense. Her claim that the law firm should be paid only $30,000.00, as fair value for its work, (Tr. July 13, 1989, p. 37) is undermined by the fact that she, in fact, paid $53,333.00 plus costs

[1] The hearing was had before the same judge who presided over the original wrongful termination suit.

to Mr. Schutter to settle his lien against her (that being one-third plus costs of the $115,000 settlement offer that Mr. Schutter had obtained for her) (*Id.* pp. 36-38). She made that agreement even though he had performed *no* trial work *or* appellate work whatsoever and had not obtained a judgment in her favor.

At the end of a five-day trial, on evidence that was largely uncontradicted, the court concluded that: (1) Petitioner was not under any duress when she made her agreement with Respondent; (2) her objections to the fees were neither credible nor meritorious; (3) there was *no* agreement that Respondent pursue Mr. Schutter or anyone else; and (4) expert testimony showed that the fees charged were fair, reasonable and well within community norms.

B. Post-Trial History

During the trial of Respondent's lien, Petitioner was represented by attorneys John Chanin and Keith Yamada. Philip Bogetto, and Peter Esser and Willard Peterson also entered appearances as additional co-counsel. Since the Supreme Court judgment, she has, in addition, hired Ephraim Margolin of California. He is the eighth lot of lawyers to represent her. Among the eight, she has contested the fees of the third (Schutter), fourth (Respondent) and also the fifth, John Chanin. (Mr. Chanin has filed a lawsuit and notice of lien on the balance of the funds now held in court. *See* Appendix B).

Petitioner appealed to the Hawaii Supreme Court. On appeal, she asserted the trial court erred in: "(1) determining it had jurisdiction to award attorneys' fees; (2) denying the request for a jury trial; (3) awarding the attorneys' fees according to the contin-

gency fee contract, when it was obtained under duress or fraud, terms were unexplained, or the fee was out of proportion to the value of services rendered; (5) [sic] awarding the fees according to the contingency fee contract when the client discharged the attorney before the end of litigation; and (6) [sic] finding, in the alternative, the fee was reasonable under quantum meruit." (Hawaii Supreme Court memorandum opinion at 2.)

As to the jury issue, Petitioner's brief (Section VIB of which is attached hereto as Appendix C) first conceded that the federal Seventh Amendment did not apply, and then argued the issue under the State Constitution.[2]

On January 9, 1991, the Supreme Court issued its unpublished memorandum decision. Without specification, the decision rejected all of Petitioner's arguments, and affirmed the judgment in its entirety.[3]

---

[2] Her brief stated: "*The U.S. Supreme Court has ruled, however, that the Seventh Amendment "does not in any manner whatever govern or regulate trials by jury in state courts."* [citations]. . . . This Court has ruled that, "*[w]e then must turn to the state constitutional provision and the statutes and rules implementing it" to determine when the right to jury trial attaches in a civil case.*" (Petitioner's Opening Brief at 20, emphasis added). The brief then proceeds to cite the Hawaii Constitution.

[3] After a statement of facts, the Hawaii Supreme Court opinion consisted, in its entirety, of the following: "After a careful review of the record, we conclude that the trial court did not err in enforcing the fee agreement. We further conclude that, the trial court did not err in finding the fees requested by Respondent to be reasonable. As to the other grounds asserted by Petitioner and by Respondent on their cross-appeal, we find no reversible error. Affirmed."

Judgment pursuant to the memorandum decision was filed on January 31, 1991.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO SIGNIFICANT FEDERAL ISSUE UPON WHICH THIS COURT COULD TAKE JURISDICTION

A. Petitioner Failed to Present a Federal Issue Below; The Hawaii Supreme Court Has Not Passed on a Federal Issue; There Are Adequate State Grounds For Its Decision

Supreme Court Rule 14.1(h) requires that:

> "the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner or raising them and the way in which they were passed upon by those courts; and such pertinent quotation. . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari."

Petitioner has not made this showing. The above citation of the record shows that, on the contrary, Petitioner failed to raise the federal issue before the Hawaii Supreme Court. Rather, she conceded the lack of a federal issue, and elected to proceed under state constitutional grounds.

Moreover, the memorandum opinion makes no reference, explicitly or implicitly, to the jury issue. The grounds for the Hawaii Supreme Court decision is therefore unclear. When "the highest state court has

failed to pass upon a federal question, *it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.*" *Street v. New York*, 394 U.S. 576, 582 (1969) (emphasis added). Under such circumstances,

> "[t]here must be some affirmative showing that a federal question was presented to the state court and that a decision on such question was *necessary* to a determination of the cause. *When this principle is not clearly satisfied, especially because of the presence of an adequate state ground, jurisdiction will be declined [citations]. To overcome that presumption, the party seeking review 'must demonstrate that neither of the state grounds can account for the decision below.' Durley v. Mayo*, 351 U.S. 277, 281 (1956)."

Stern, Gressman & Shapiro, *Supreme Court Practice* (6th ed. 1986) [hereafter "Stern"] (emphasis added).

Petitioner may make this demonstration by obtaining a certificate from the court appealed from, showing that the federal question was raised and decided. The duty to obtain such a certificate is on "counsel for the *petitioner*". *Lynumn v. Illinois*, 372 U.S. 528, 535-36 (1963). Petitioner has made no such effort in this case.

On the contrary, there were adequate state grounds on which the Hawaii Supreme Court could have ruled against Petitioner. These included the argument (see Part III below) that Petitioner failed to demand jury trial timely. Similarly, Respondent argued (see Part III below) that due to the narrow scope of Petitioner's

jury demand, the lack of jury trial was at most harmless error, because after the court issues were determined, no jury issue remained.

Petitioner has failed to show that a federal question was presented, or that it was necessary to the Hawaii Supreme Court decision. Jurisdiction by this Court should be declined.

B. There Is No Federal Question At All Because the Seventh Amendment Does not Bind the Hawaii Courts

Petitioner acknowledges that the Seventh Amendment has no applicability to the states. She asserts, however, that the Hawaii Supreme Court has made it "binding" in Hawaii, thereby turning every jury issue under the Hawaii state constitution into a federal question.

This is not the law.

Hawaii Supreme Court cases have consistently held that "[t]he Seventh Amendment jury trial requirement is not binding upon the states." *Harada v. Burns*, 50 Haw. 528, 532, 445 P.2d 376, 380 (1968). *Accord Viveiros v. State*, 54 Haw. 611, 618, 513 P.2d 487 (1973) ["State courts, on the other hand, are not bound by the same constitutional constraints, since the Seventh Amendment is not binding upon them."] (Levinson & Kobayashi, JJ. concur. & dis.); *Lum v. Sun*, 70 Haw. 288, 294, 769 P.2d 1091 (1989) ["[T]he Seventh Amendment, [however], applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts. . . ." (citation omitted).''].

Petitioner misperceives Hawaii law when she asserts, contrary to these clear holdings, that Hawaii courts have made the Seventh Amendment "binding" on themselves.

C. The Hawaii Supreme Court Decision is an Unpublished Memorandum Decision, Applies Only to the Parties, and Has No Precedential Effect

> "The importance of the issues involved in the case as to which review is sought is of major significance in determining whether the writ of certiorari will issue. The Court does not have time to give full consideration to all cases which present novel or interesting issues. It must necessarily confine itself to those which reflect the more important legal problems within the realm of its jurisdiction. And the problem, though intrinsically important, must be *"beyond the academic or the episodic." Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955)."
>
> *****
>
> *"[T]he importance of a case depends on how many other persons, apart from the actual litigant, will be affected by the questions presented."*
>
> *****
>
> "An issue the Court deems of interest and importance *only to the immediate parties to the case* is not likely to qualify as worthy of further consideration."

Stern at 212, 213, 374 (emphasis added).

The Hawaii Supreme Court opinion is a *memorandum* decision. A memorandum decision is not published, cannot be cited, and has no precedential value.

Haw. Rules App. Pro. 35.[4] By definition, it affects and "is of interest and importance only to the immediate parties", and can present no issue that qualifies as "important" for certiorari.

II.

THE HAWAII SUPREME COURT FAIRLY AND CORRECTLY DENIED JURY TRIAL; A LIEN PROCEEDING IS EQUITABLE AND NOT TRIABLE TO A JURY; THIS HOLDING IS NOT IN CONFLICT WITH ANY CASE FROM THIS COURT

In Petitioner's Motion for Jury Determination, the *sole* issue upon which she demanded a jury trial was as follows:

> the issue of *what constitutes a reasonable and proper attorney's fee*, if any, which is payable by plaintiff Eugenie Parnar to the law firm of Green, Ning, Lilly & Jones. (emphasis added)

(R. Vol. 13 at 4). Petitioner filed no counterclaim and thus, had no right to demand a jury based on any counterclaim.

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[4] Rule 35. Opinions.

(a) Classes of Opinions. Opinions may be rendered by a designated judge or justice, or may take the form of per curiam or memorandum opinions.

(b) Publication. Memorandum opinions shall not be published.

(c) Citation. A memorandum opinion shall be not cited in any other action or proceeding except when the opinions establishes the law of the pending case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent.

Petitioner's jury demand was untimely. It was filed May 25, 1989, (R. Vol. 13 at 1-7) more than 10 days after her Opposition, filed on April 21, 1989 (R. Vol. 12 at 90-111). Therefore, the jury demand did *not* comply with Rule 38 or Haw. Rev. Stat. § 607-5(29), and was therefore untimely.

Thus, Petitioner filed her jury demand too late. Even then she did not seek a jury trial on the issue of Respondent's *entitlement* to the fee, that is, the validity of the contract—the liability issue on which she rested her whole defense—she *only* sought it on the *amount* of the fee.

Petitioner argues that she should have had a jury, yet in *none* of the Hawaii cases involving attorney lien proceedings, did any party have a jury trial. *See Keating v. Keating*, 43 Haw. 51 (1958); *Tuinei v. City & County*, 2 Haw. App. 574, 636 P.2d, 363 (1981); *Makani Dev. Co. Ltd. v. Stahl*, 4 Haw. App. 542, 670 P.2d 1284 (1983); *Carroll v. Miyashiro*, 50 Haw. 413, 441 P.2d. 638 (1968). While those cases do not expressly discuss the jury issue, they are consistent with numerous authorities from other jurisdictions which hold *against* such entitlement. This is because lien enforcement proceedings are not "suits at common law" subject to jury trial. *See Doe v. Roe*, 5 Haw. App. 558, 565, 705 P.2d 535 (1985) ["Both [federal and state] constitutions reserve the right to a jury "[i]n suits at common law" " a paternity suit is not a suit at common law]; *Honolulu S&L v. Ing*, 40 Haw. 269 (1953) [mortgage foreclosure is not a suit at common law].

Thus, in the leading case of *Skelton v. Spencer*, 102 Idaho 69, 625 P.2d 1072 (1981), the court reasoned as follows:

The appellant raises another objection to the procedure followed below; that she was denied a right to a jury trial. *The assertion and enforcement of attorney's liens is an equitable exercise.* This court recognized the equitable nature of the lien in *Nancy Lee Mines, Inc. v. Harrison*, 93 Idaho 652, 654-5 (n.4), 472 P.2d 39, 41-2 (1970). See also, 7 Am. Jur. 2d §346 (1980). As such an equitable procedure, it is generally held that *these causes are triable to the court. Speiser, supra,* at § 16.36, p. 400 ("*[t]here is no right to a jury trial in the proceeding.*"). In response to the same demand for jury, the Missouri appellate court stated in *Fein v. Schwartz*, 404 S.W.2d 210 (Mo. App. 166):

> *The attorney's lien, whether under the statute or at common law, is equitable in its nature.* Even decisions in this country, which confine its existence and application to the narrowest limits, always speak of it as an equitable lien, right or privilege. . . But where the thing is not in possession [i.e., is not a retaining lien], and some affirmative action is required by the attorney, he like other lien claimants, must seek relief in equity . . . There is no question but that a proceeding such as this one is an equitable one, in that it is triable before a court of equity.
>
> *The instant suit is one in equity in which a trial by jury did not exist at common law and never has as a matter*

> *of right in this state.* 404 S.W.2d at 228. (emphasis added)

Id. at 1079; *accord Frazee v. Frazee*, 104 Idaho 463, 660 P.2d 928, 931 (1983); *Boline v. Doty*, 345 N.W.2d 285 (Minn. App. 1984); *Village of New Brighton v. Jamison*, 278 N.W.2d 321 (Minn. 1979); *see also Kleager v. Schaneman*, 212 Neb. 333, 322 N.W. 659, 662-63 (1982) ["The proper method for enforcing an attorney's charging lien is by resort to equity, because such a lien is equitable in nature [citation omitted]. The pleadings in the present action joined issue on the question of whether the plaintiff preserved a legitimate attorney's lien upon which he could 'foreclose.' Therefore, it was an equitable action in which the defendant was not entitled to a jury trial."]

> A proceeding initiated to establish an attorney's lien, as in this case, is equitable in nature, *Fillmore v. Wells*, 10 Colo. 228, 15 P.343 (1887), and *there is no right to a jury trial in such actions. Miller v. District Court*, 154 Colo. 125, 388 P.2d 763 (1964). Appellant's counterclaim for breach of contract did not change the nature of the action. *See In re Trust of Malone*, 658 P.2d 284 (Colo. App. 1982). *Therefore, the court did not err in denying the jury request.* (emphasis added)

In re Marriage of Rosenberg, 690 P.2d 1293, 1294-95. (Colo. App. 1984) 1294-95.

The cases cited by Petitioner discuss the proposition of whether or not a party is entitled to a jury trial in an *independent* action for attorney's fees. That proposition is immaterial to this case because

Respondent properly chose, under Hawaii state procedure, to file a motion to enforce lien *in the underlying action*, where Petitioner is clearly *not* entitled to a jury trial. *See Litman v. Fine, Jacobson*, 517 So.2d 88 (Fla. App. 1987). In that case, the court held that an attorney has merely to assert a claim of lien in the main case to become entitled to a determination "by the court, sitting without a jury, of the amount of attorney's fees due." *Id.* at 93.

> However, if an attorney has *not* claimed a charging lien or there are no proceeds to which a lien can attach, he nonetheless retains the right to sue the client on the contract *in an action at law* in which the client is entitled to a jury trial. (emphasis added)

Id. at note 7.

Nor is there existence of "joint" legal and equitable issues. In *In re Rosenman & Colin*, 850 F.2d 57 (2d Cir. 1988), the court disposed of Petitioner's argument that the proceeding was "really" a contract dispute, and held that lien enforcement proceedings are "inherently equitable" notwithstanding the existence of traditional legal issues. It also expressly distinguished *Simler v. Conner*, 372 U.S. 221 (1963), chiefly relied on by Petitioner to show a conflict between the Hawaii Supreme Court decision and this Court's for the reason that *Simler* was a declaratory judgment action, not an equitable lien enforcement action:

> *In the context of both attorneys' liens and other liens, such actions have repeatedly been regarded as equitable in nature so that no jury right attaches. See Damsky v. Zavatt,*

289 F.2d 46, 53 (2d Cir. 1961) (tax lien); *Walter E. Heller & Co. v. O/S Sonny V*, 595 F.2d 968, 976 n.7 (5th Cir. 1979) (mortgage foreclosure); *In re King*, 168 N.Y. 53, 58-59, 60 N.E. 1054, 1056 (1901) (attorney's lien); *Flores v. Barricella*, 123 A.D.2d 600, 600, 506 N.Y.S.2d 885, 886 (2d Dep't 1986) (attorney's lien); *In Re Britton's Will*, 187 Misc. 70, 60 N.Y.S.2d 466, 474 (Monroe Cty. Surr. Ct. 1946) (attorney's lien).

Simler v. Conner, 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed.2d 691 (1963), *on which Richard relies, is not to the contrary. In that case, the Supreme Court held that the plaintiff was entitled to a jury in a declaratory judgment action he brought to determine the extent of his liability to an attorney under a retainer agreement. Simler followed the long-settled rule that declaratory judgment actions are inherently neither equitable nor legal and that the nature of the underlying dispute determines whether a jury trial is available. See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct, 948, 3 L.Ed.2d 988 (1959); *(American) Lumbermens Mutual Casualty Co. v. Timms & Howard, Inc.*, 108 F.2d 47, 499 (2d Cir. 1979); *Owens-Illinois, Inc. v. Lake Shore Land Co., Inc.*, 610 F.2d 1185, 1189 (3d Cir. 1979); Fed. R. Civ. P. 57, 5 *Moore's Federal Practice*, para. 38.29 at 38-230 (2d ed. 1987). *In contrast to declaratory judgment actions, proceedings to enforce a lien are inherently equitable. No jury is available notwithstanding that traditionally legal issues*

> *are raised, such as the contractual liability giving rise to the lien. See Damsky v. Zavatt, supra,* 289 F.2d at 53; *Walter E. Heller & Co. v. O/S Sonny V, supra,* 595 F.2d at 976 n.7; *Roselle v. Connecticut General Life Insurance Co.*, 471 F.2d 29, 31 (10th Cir. 1972), *cert. denied*, 411 U.S. 921, 93 S.Ct. 1549, 36 L.Ed.2d 314 (1973).

Id. at 574-75 (emphasis added).

Simler v. Conner is not "stunningly similar" as Petitioner asserts, but easily distinguished.

Petitioner cites *Jarman v. Hale*, 112 Idaho 270, 731 P.2d 813 (Idaho App. 1986). That case did *not* involve a contingent fee agreement, and apparently no written agreement at all.[5] The attorney filed a complaint for his fees earned during representation of the client in a civil rights case, and to enforce lien. The client counterclaimed in malpractice. The court held that

> The record before us presents a factual dispute over *terms of the parties' agreement as to fees and as to whether fees have been earned and properly billed.* The Hales are entitled to have these disputed issues of fact determined by a jury. However, separate issues are posed by a charging lien of an attorney that is equitable in nature and triable to the court, *Frazee v. Frazee*, 104 Idaho 463, 660

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[5] "*If* there is an amount of fees and costs due from the Hales under a contract then that contract amount will determine the amount of the lien. If the trier of the facts determines there was no contract fixing fees, Jarman may nevertheless be entitled to recover under a quantum meruit theory." *Id.* at 818 (emphasis added).

> P.2d 928 (1983). *The court and not a jury will determine the validity of the lien and the scope thereof. Skelton v. Spencer, supra.* As noted earlier, the *amount* of any lien will be limited by the amount to be due from the client to the attorney. (emphasis added)

Id. at 818-19. The principal issues in that case were therefore whether a contract existed, its terms, and the amount of the fee, which was not a contingent fee. This, and not Petitioner's, reading, harmonizes the case with *Skelton v. Spencer*, 102 Idaho 69, 625 P.2d 1072 *supra.*

Petitioner filed no counterclaim for malpractice or for any other matter, or any independent suit. It was uncontroverted that a contract existed; its terms were acknowledged, and the percentage fee was clear. There was no dispute about the amount due under the contract because the terms were clear but Petitioner still demanded a jury trial on whether the fee was "reasonable." But of course, as the authorities cited show, that issue is reached only after the court determines that the written contract must be set aside for fraud and coercion, which the court refused to do.[6] Once the court determined that the contract should be enforced and not set aside, the jury issue of reasonableness was moot. It became moot because of the court's other rulings, i.e., if the contact is valid, enforceable, and complete on its face as the court found, a jury *would have been required* to come to the *same* conclusion as the court did on the *amount* of the fee, which was a simple percentage calculation.

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[6] Parnar did not, in her jury demand, assert that the issue of setting aside the contract should go to a jury.

For that reason, after the court's findings of liability under the contract, *no jury issue remained.* Thus, at *most*, it was harmless error for the trial court to have denied Petitioner a jury trial on such an issue.

The Hawaii Supreme Court and the trial court correctly denied jury trial, or 1) failed to address the jury issue because the jury demand was untimely or 2) failed to address it as a federal question because it was never so presented. Consequently, there is no reversible error for this Court.

CONCLUSION

The Court should decline to exercise its discretionary jurisdiction because (1) there is no federal question; (2) Petitioner failed to present the asserted federal question to the state court; (3) there were adequate state grounds for the decision; (4) there is no issue of general importance because the memorandum decision sets no precedent and is limited to the parties; and (5) the Hawaii Supreme Court decision is consistent with cases from other jurisdictions, is not inconsistent with the law of this Court, and yielded a fair and correct result.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EUGENIE PARNAR,

Plaintiff,

vs.

AMERICANA HOTELS, INC., FLAGSHIP INTERNATIONAL, INC., MARK E. LIQUORI, JOHN DOES 1-25, JANE DOES 1-25, DOE CORPORATIONS 1-25, DOE PARTNERSHIPS 1-25,

Defendants.

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CIVIL NO. 52878

FINDINGS OF FACT and CONCLUSIONS OF LAW

1ST CIRCUIT COURT STATE OF HAWAII
FILED

1989 SEP 13 P 4:16

N. ANAYA
CLERK

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On April 18, 1989, Movants Green, Ning, Lilly and Jones ("GNLJ") filed a Motion for Partial Enforcement of Attorneys' Lien. Plaintiff Eugenie Parnar ("Parnar") filed a Response and Request for Continuance on April 21, 1989. Both parties filed supplementary memoranda and affidavits and the hearing was originally set for April 24, 1989, was continued by the Court to July 6, 1989.

On July 3, 1989, GNLJ filed an Amended Motion for Partial Enforcement of Attorneys' Lien. There was no opposition to the Motion and on July 6, 1989, the parties stipulated in open Court to allow this Court to determine the entire amount of attorneys' fees and costs due GNLJ.

At the same time, the parties also stipulated that all witnesses listed by both Parnar and GNLJ would be allowed to testify. As a result, Parnar withdrew her Motion to Strike Michael A. Lilly and GNLJ's Statement of Issues and Witnesses Regarding Motion for Partial Enforcement of Attorneys' Lien.

On July 6, 7, 11, 12, and 13, 1989, the Court heard testimony from Michael A. Lilly, Esq., Wayne D. Parsons, Esq., Richard J. Knowen, Esq. and Parnar, on behalf of GNLJ, and Larry L. Zenker, Esq., Charles J. Ferrera, Esq., and Parnar on behalf of Parnar. The Court qualified Wayne D. Parsons, Esq., as an expert on behalf of GNLJ. Parnar chose not to submit any expert testimony.

The Court also received numerous exhibits from both sides as reflected in the record. The court heard final arguments on July 13, 1989. After considering the documentary evidence, the testimony and credibility of the witnesses, and having considered the arguments of counsel, the Court hereby enters the following Findings of Fact, Conclusions of Law and Judgment:

FINDINGS OF FACT

1. In 1975, Parnar was fired from her job as a secretary with the Ala Moana American Hotel. In or about 1977, she filed suit against the Americana Hotels, Inc. and its parent company, Flagship International, Inc., for wrongful termination.

2. Parnar has more than a layman's knowledge of contingency fee agreements, having entered into the following three (3) such agreements before the one at issue in this case. No claim is being made herein for attorneys' fees due any previous attorney. However, previous fee agreements were as follows:

a. In or about 1977, Parnar entered into a oral contingency fee agreement with the law firm of Brown & Bettencourt, whereby they would be entitled to a 33.33% fee on any recovery in this case;

b. In 1981, Parnar terminated Brown & Bettencourt and hired Susan Ichinose ("Ichinose") to represent her. Parnar and Ichinose entered into a written contingency fee agreement whereby Ichinose would be entitled to a 33.33% fee on any recovery in this case;

c. In 1985, Parnar terminated Ichinose and hired David Schutter (and his associate Charles Ferrera) (hereinafter collectively "Schutter") to represent her. Parnar and Schutter entered into a written contingency fee agreement with the following relevant terms:

.i) contingency fees of 33.33% through trail, 40% after the filing of a notice of appeal, and 45% after remand to the lower court; and

ii) Schutter was given advance authority to settle the case for any sum in excess of $200,00 upon consultation with Parnar.

3. A controversy development between Schutter and Parnar on the eve of trial in January, 1987, the details

of which were testified to at length in this matter. As a result of that controversy, Parnar terminated her relationship with Schutter on January 30, 1987 and hired the law firm of GNLJ on a contingency fee basis. Lilly and Parnar discussed the contingency fee agreement orally on Thursday, January 29, 1987, Friday, January 30, 1987 and again on Monday, February 2, 1987. The terms of the contingency fee agreement ("Fee Agreement") were memorialized in writing on February 2, 1987. The principal terms of the Fee Agreement were as follows:

a. GNLJ would represent Parnar in the trial and potential appeal of her case against Defendants Americana Hotels, Inc. and Flagship International, Inc.;

b. GNLJ would receive a contingency fee of 33.33% through trial and 40% after the filing of a notice of appeal; and

c. GNLJ's contingency fee would not be offset by any attorneys' fees Parnar might owe to any of her prior attorneys in the case.

4. Parnar read and signed the Fee Agreement on Monday, February 2, 1987. The Fee Agreement is clear on its face. It is not ambiguous. It is fair and reasonable. It fully and completely memorializes the agreement reached between Parnar and GNLJ. The Court also finds that Parnar understood the terms of the Fee Agreement before she signed it.

5. No commitment was made by GNLJ to Parnar, or anyone else, to bring a malpractice or disciplinary action against Schutter or a disciplinary action against Judge Waldorf. The expressed terms of the Fee Agreement reflected the intent of the parties that GNLJ was hired to pursue only the case against the Americana Hotels, Inc. and Flagship International, Inc. GNLJ was not hired by Parnar to bring any other action against Schutter or Judge Waldorf. Moreover, GNLJ did not make any representa-

tions that they would undertake any such actions. Parnar did not have reasonable basis for believing that GNLJ intended to undertake any such actions.

6. GNLJ committed no fraud or misrepresentation to induce Parnar to enter into the Fee Agreement. Parnar was not under duress or undue influence from GNLJ when she entered into the Fee Agreement GNLJ. Parnar conceded in her testimony that GNLJ did not threaten, or intimidate her, in any way, that whatever emotional strain she may have been under was caused by Schutter and/or Judge Waldorf, and that her overriding feeling on February 2, 1987 was her gratitude to Lilly for "rescuing" her from what she considered to be a very difficult situation.

7. It is also clear from the evidence that Parnar did not sign the Fee Agreement until Monday, February 2, 1987, and that at that time, she already had obtained a continuance of the trial, already had found other counsel and had already prevailed on Schutter's Motion to have her declared incompetent because of her refusal to accept the Defendants' offer of $115,000, which Schutter had vigorously recommended. The Court finds that there is no basis to find that Parnar was under any duress or distress at the time she executed the Fee Agreement with GNLJ.

8. On January 30, 1987, and February 2, 1987, when GNLJ agreed to represent Parnar, there was a reasonable probability that the case would result in a total loss or a low recovery, thereby subjecting GNLJ to a substantial risk of receiving minimal or no fees for their work. According to the expert testimony from Mr. Parsons, wrongful termination cases were viewed by the profession, in general, at the time, as high risk cases since no "public policy" exception case had ever been tried in a Hawaii court before. According to Mr. Ferrera, he and Schutter had recommended settlement at $115,000, in part, because they both evaluated Parnar's possible wage loss recovery

at only $40,000 and because they did not believe that Parnar would be a good witness. GNLJ was uncertain how fully the case had been prepared for trial or how much further work would be necessary to try it. In addition, GNLJ was undertaking representation of a new client whose relationship with Schutter and Ferrera had terminated on the eve of trial under very controversial circumstances.

9. At the time Parnar entered into the Fee Agreement with GNLJ, Parnar represented to GNLJ that she would pay them pursuant to the Fee Agreement.

10. In reliance on both Parnar's representations and the Fee Agreement, GNLJ worked extensively on Parnar's case. Between January 30, 1987 and the start of trial on April 13, 1987, GNLJ obtained an extension of the trial date, prepared for trial, conducted additional discovery, filed various pre-trail motions, opposed motions filed by Defendants, prepared expert and lay witnesses, and became familiar with the record.

11. The Court notes that the evidence, including the testimony of Mr. Fererra, Mr. Lilly, Mr. Knowen and Mr. Parsons, confirmed that taking over Parnar's case shortly before trial, involved a tremendous amount of work by GNLJ.

12. After over a week of trial, the jury rendered the following jury verdict in favor of Parnar:

a. $1.5 million, for punitive damages;

b. $275,000, for emotional distress; and

c. $300,000, for lost income.

A judgment in the above amounts, providing for post-judgment interest t the legal rate, was entered on May 26, 1987.

13. Parnar obtained very substantial benefits from GNLJ's efforts. While Schutter had valued the case at

approximately $115,000 and Parnar herself had authorized settlement on one occasion at $125,000, GNLJ obtained a substantial verdict of $2,070,000—apparently the highest reported award for wringful termination in Hawaii.

14. The Court finds that before, during and after trial, Parnar made no mention of any objection to the Fee Agreement with GNLJ or to the payment of their fees pursuant to the Fee Agreement. The Court finds that GNLJ performed their part of the Fee Agreement in reliance on Parnar's promises to pay them the amount provided in the Fee Agreement.

15. In August 1987, Parnar did specifically ask GNLJ if they would bring a malpractice action against Schutter. GNLJ declined because, among other reasons:

a. GNLJ would likely be important witnesses for Parnar in any such action;

b. Canon 5 of the Code of Professional Responsibility would preclude them from representing her;

c. It was doubtful if there would be any damages available on such an action given the $2,075,000 jury verdict in her case; and

d. If she wanted to pursue such an action, it would be in her own best interest to be represented by an independent attorney on any such claim.

16. Not until August 1987, did Parnar raise any question about the Fee Agreement. At that time, Parnar was agreeable to paying the 33.33% contingency fee; however, she questioned increasing the contingency fee to 40% solely because a notice of appeal was filed. Parnar felt that the additional 6.6% was unreasonable if the case settled shortly after the filing of the notice of appeal if no work was done on the appeal. In response to Parnar's concern, GNLJ offered to amend the Fee Agreement to provide a sliding scale from 33.33% to 40% as the work was done on the

appeal. However, Parnar cancelled the appointment scheduled to discuss the matter with Mr. Lilly and never raised it again.

17. In August 1987, Parnar also raised the issue that she might want to amend the Fee Agreement to give her an option to terminate GNLJ and hire new counsel if her case were reversed after the appeal. Such an amendment was prepared and signed by GNLJ and mailed to Parnar, however, Parnar never executed or returned the amendment.

18. In any case, the evidence was uncontradicted, and the Court also finds, that both issues involving the Fee Agreement are moot since neither arose. First, the case did not settle pending appeal and all of the work on the appeal was completed, so that GNLJ earned the increase from 33.33% to 40%. Second, there was no remand and therefore, it was not necessary to hire counsel for a new trial.

19. On August 18, 1987, Defendants appealed the verdict. Briefs were researched, prepared and filed by GNLJ. Thereafter, GNLJ argued the case for Parnar before the Supreme Court of Hawaii, all without objection by Parnar and all in reliance on the terms of the Fee Agreement and the representations made by Parnar to GNLJ that they would be paid pursuant to the Fee Agreement.

20. On August 17, 1988, the Supreme Court rendered its Memorandum Opinion and affirmed the jury verdict in Parnar's favor. The Judgment on Appeal was entered on September 12, 1988. Thereafter, Defendants filed a Motion for Reconsideration, which GNLJ successfully opposed on behalf of Parnar. Defendants then moved for a stay of judgment pending review by the United States Supreme Court. GNLJ opposed the stay and the Court limited the stay to the issues and amounts involved int he punitive award of $1.5 million. The compensatory awards for lost income and emotional distress, together with the post-judg-

ment interest, were paid by Defendants to Parnar and placed in GNLJ's client trust account on September 29, 1988.

21. After his discharge, Schutter had filed a lien for his attorneys' fees. Following the successful verdict, as an accommodation to Parnar, GNLJ drafted a Motion to Vacate the Attorneys' Fees and Cost Lien filed by Schutter and gave it to Parnar to review and edit. However, because Schutter had threatened to sue Parnar for attorneys' fees of $300,000 on the basis of quantum meruit and because such an action would likely involve GNLJ as necessary witnesses for Parnar, GNLJ recommended that Parnar obtain independent counsel to advise her in the matter as well. Parnar did obtain separate counsel, John A. Chanin, Esq. The motion to vacate Schutter's lien was never filed. Instead, Parnar settled with Schutter for $53,333, $^1/_3$ of the last offer he obtained of $115,000, plus his costs.

22. On November 8, 1988, Parnar terminated GNLJ in a letter from Mr. Chanin. Parnar gave GNLJ no valid reasons whatsoever for the termination.

23. Based on all the evidence, the Court finds that Parnar's reason for terminating GNLJ was to avoid paying GNLJ under the Fee Agreement.

24. GNLJ was, until they were terminated, ready, willing and able to complete all further work on behalf of Parnar in this case, including the filing of an opposition to Defendants' expected Petition for Writ of Certiorari to the United States Supreme Court. Based on the evidence, the Court finds that GNLJ had already done the work on the issues for the appeal and post-appeal motions to the Hawaii Supreme Court. This research was made available to Parnar's new counsel, without condition, and even though GNLJ had no been paid.

25. On July 3, 1989, Defendant's Petition for Writ of Certiorari to the U.S. Supreme Court was denied and the

jury verdict in favor of Parnar is now due and owing in full.

26. On April 18, 1989, GNLJ filed their Motion for Partial Enforcement of Attorneys' Lien herein. On July 3, 1989, GNLJ filed their Amended Motion for Partial Enforcement of Attorneys' Lien. At the trial of the Lien, Parnar testified that she believed GNLJ was obligated to pursue a malpractice action against Schutter, and disciplinary action against Shutter, a disciplinary action against Judge Waldorf and to defend against Schutter's lien, all as a part of the Fee Agreement in this case. She believed these actions were warranted because of the pressure allegedly placed upon her to settle her case. GNLJ denied ever having been hired to pursue these matters or to do anything other than represent Parnar on her claims against the Defendants in this case.

27. Based upon the testimony, the various conflicts in the testimony and the demeanor of the witnesses, the Court finds that Parnar's memory and testimony are not reliable or credible as to these issues or any of the material disputed issues of fact. Parnar took several different and inconsistent positions with respect to authorization to settle the case at $125,000. It was confirmed by both Mr. Kowen and Mr. Ferrera that she did in fact authorize a settlement at $125,000.

28. Parnar's own testimony revealed her to be a person who capably and strongly resisted pressure by Schutter, Mr. Ferrera and Judge waldorf to settle the case, a person who argued persuasively with Schutter and with Judge Waldorf that she was competent and had a right to proceed to trial, a person who independently sought out the legal assistance of her attorney friend, Larry Zenker, when in need, and a person who ultimately dismissed Schutter because she was not satisfied with his services. Parnar is clearly a very strong-willed person who is capable of evaluating the circumstances she is in, making judgments about

them and acting in her own best interests. The Court finds that Parnar was not subjected to any duress, undue influence, or intimidation of any sort whatsoever in connection with the execution of the Fee Agreement with GNLJ.

29. The Court finds that under the Fee Agreement, Parnar was always free to discharge GNLJ but did not do so until the result of the case was virtually assured.

30. The Court finds that the actual costs incurred on behalf of Parnar by GNLJ before their discharge in this case was $8,938.69. The Court finds that this amount is reasonable and necessary. The Court disallows all other costs sought by GNLJ since they were incurred after their discharge.

CONCLUSIONS OF LAW

1. This Court, as the trial judge in Parnar's case in chief, has jurisdiction over this matter.

2. Under the Guidelines established in *Sharp v. Hui Wahine, Inc.*, 49 Haw. 241 (1966) and DR 2-106, this Court concludes that the Fee Agreement is neither illegal nor clearly excessive, but rather is fair and reasonable for the following reasons:

a. This was the first case tried which involved the public policy exception to the at-will doctrine to be tried in Hawaii, it was a novel and difficult case that would and did required GNLJ to expend a substantial amount of time and labor both at trial and on appeal.

b. From the testimonies of Wayne Parsons, Michael Lilly and Parnar, the Court concludes that all provisions of the Fee Agreement were well within the range of customary charges by attorneys in Hawaii for similar cases. Indeed, the Fee Agreement is more beneficial to Parnar than her agreement with Schutter because: it did not require a payment of 45% after remand to the lower court;

it did not authorize GNLJ to settle the case for over $200,000; and GNLJ's attorneys' fees were calculated on the net recovery after first deducting costs.

c. The amount in controversy in this case before trial was highly uncertain.

d. Parnar obtained substantial benefits from GNLJ's efforts.

e. GNLJ performed all contingencies contemplated under their fee agreement with Parnar.

f. The Court agrees with the testimony of GNLJ's expert that it is fair and reasonable and customary to provide no offset for fees owed to prior attorneys in taking a case under these circumstances.

g. The increase of fees from 33.33% to 40% upon the filing of a notice of appeal is fair and customary in Hawaii. The additional work and risk involved in handling an appeal justified the increase in the contingency fee to be paid.

3. At all times, GNLJ were ready, willing and able to complete all work connected with the case.

4. GNLJ neither committed any act nor omitted to perform any act justifying their termination. Their termination by Parnar was without reasonable, legitimate or just cause. GNLJ were not obligated, by agreement or otherwise, to pursue malpractice, disciplinary or any other action on behalf of Parnar against Schutter or Judge Waldorf. Indeed, this Court concludes that, under the Canon 5 of Code of Professional Responsibility, GNLJ correctly declined to undertake any such action because they would be likely witnesses on behalf of Parnar against Schutter and/or Judge Waldorf.

5. Parnar promised to pay GNLJ pursuant to the Fee Agreement. GNLJ relied on Parnar's promise to their detriment and are entitled to be paid pursuant to the Fee Agreement.

6. GNLJ's lien for the fees and costs was timely asserted and noticed to all parties and is enforceable.

7. Even if the Fee Agreement itself were for some reason not, enforceable, the Court concludes that the fees set forth in the Fee Agreement are, for purposes of determining a quantum meruit value of the services rendered by GNLJ, fair and reasonable. Parnar adduced no evidence of what a fair and reasonable fee for GNLJ's services would be. Parnar's unilateral and unsupported estimate that the fair amount of attorneys' fees would be $30,000 is without foundation and is facially unreasonable. The only expert witness testified that the fees as charged are consistent with community practice and fair. No conflicting testimony was presented.

8. The Court concludes that the assumpsit attorney fee statute is not applicable to this motion, and the Court declines to grant these additional fees, which were requested by GNLJ.

9. The Court concludes that GNLJ was entitled to be paid their fees on the amounts collected and paid into its client trust account in September 1988 as of the date those amounts were collected. Having not been so paid, GNLJ is entitled to pre-judgment interest on their unpaid fees and costs from the date the funds were received until the date of this order at the legal rate of ten percent (10%) per annum which sum shall accrue post-judgment interest from the date of the judgment filed herein at the legal rate of ten percent (10%) per annum until paid in full.

10. The Court finds that as of July 31, 1989, the total recovery due Parnar is $2,527,520.34. The costs in the case are $8,938.69. As of July 31, 1989, the net recovery due Parnar is $2,518,581.65. The Court finds that GNLJ is entitled to 40% of the net recovery of $2,518,581.65 which equals *$1,007,432.66*, plus their costs of *$8,938.69*, for a total award to GNLJ as of July 31, 1989 of *$1,016,371.35*. This per diem interest on this sum, at the

legal rate, is $278.46 which shall accrue on all or any portion of the sum due GNLJ until it is paid in full.

11. GNLJ shall be immediately entitled to partial payment of the amounts due hereunder from the funds held in GNLJ's client trust account. GNLJ shall be entitled to the balance due as follows: The remainder of the Jugment shall be paid by Defendants into GNLJ's client trust account; GNLJ shall deduct the balance due them and forward the remainder, by certified check, to Parnar; the certified check shall be sent by hand delivery in care of John A. Chanin, Esq.; upon the delivery of the certified check to Mr. Chanin's office, all obligations of Parnar and GNLJ under the Fee Agreement shall cease.

12. GNLJ is entitled to a lien in the amount set forth above upon all monies presently held in their client trust account for Parnar and on all other funds which are due and owing to Parnar in this case until the amounts due GNLJ, with interest, have been fully paid, at which time the aid lien shall cease and be of no further offset.

ORDERED this 11th day of Sept, 1989.

/s/ Hiroshi Oshiro (Seal)
JUDGE OF THE ABOVE-ENTITLED COURT

I do hereby certify that this is a full, true, and correct copy of the original on file in this office.

/s/ N. Anaya
Clerk, Circuit Court, First Circuit

APPENDIX B

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

CIVIL NO. 52878

NOTICE OF LIEN; CERTIFICATE OF SERVICE

1ST CIRCUIT COURT STATE OF HAWAII
FILED

1991 JAN 30 P 3:12

N. ANAYA
CLERK

EUGENIE PARNAR,

Plaintiff,

vs.

AMERICANA HOTELS, INC., FLAGSHIP INTERNATIONAL, INC., MARK E. LIQUORI, JOHN DOES 1-25, JANE DOES 1-25, DOE CORPORATIONS 1-25, DOE PARTNERSHIPS 1-25,

Defendants.

Of Counsel:
THE LAW OFFICES OF JOHN A. CHANIN

JOHN A. CHANIN 650
JAMES Y. AGENA 3385
KEITH Y. YAMADA 4044
Four South King Street
Honolulu, Hawaii 96813
Telephone No. 538-1165

NOTICE OF LIEN

THE LAW OFFICES OF JOHN A. CHANIN, hereby gives notice to all parties concerned that it has a lien on funds

recovered in the above-entitled action by Plaintiff, for legal services rendered to the Plaintiff in this action, and for disbursements made and costs incurred for Plaintiff herein as set forth below.

The lien secures payment of the following amounts:

Attorneys' fees and costs in the amount of $24,431.88, plus interest, costs and reasonable attorneys' fees as permitted by law and for such other and further relief as this Court deems just and proper in the premises.

DATED: Honolulu, Hawaii, January 30, 1991 .

/s/ Reed Clausen
JOHN A. CHANIN
KEITH Y. YAMADA
Attorneys for Plaintiff
EUGENIE PARNAR

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

APPENDIX C

[SEC. VIB OF PETITIONER'S OPENING BRIEF, HAWAII SUPREME COURT]

* * *

B. ATTORNEYS' FEES DISPUTES UNDER CONTINGENT FEE CONTRACTS ARE LEGAL ACTIONS, AND THE CLIENT IS ENTITLED TO A JURY TRIAL NOTWITHSTANDING THE FACT THAT THE LAWYER REQUESTS RELIEF THROUGH AN EQUITABLE REMEDY, SUCH AS ENFORCEMENT OF AN ATTORNEY'S LIEN.

The Seventh Amendment to the U. S. Constitution provides that:

> [i]n [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the common law.

The U. S. Supreme Court has ruled, however, that the Seventh Amendment "does not in any manner whatever govern or regulate trials by jury in state courts.'" *Minneapolis & St. Louis R. R. v. Bombolis*, 241 U.S. 211, 217 (1916); *see also, Melancon v. McKeithen*, 345 F.Supp. 1025, 1045 (1972), *aff'd sub nom., Hill v. McKeithen*, 409 U.S. 942 (1972) ("a civil jury trial is not so implicit in the concept of ordered liberty in a cooperative federalism as to be required of the states by due process"); *Harada v. Burns*, 50 Haw. 528, 532, 445 P.2d 376 (1968) ("[t]he seventh amendment jury trial requirement is not binding upon the states").

This Court has ruled that, "[w]e then must turn to the state constitutional provision and the statutes and rules implementing it" to determine when the right to jury trial

attaches in a civil case. *Lum v. Sum*, 70 Haw. ___, 769, P.2d 1091, 1095 (1989). Article I, Section 13 of the Hawaii Constitution provides a right to a jury trial:

> [i]n suits at common law where the value in controversy shall exceed five thousand dollars[.]

HRS Section 635-13 provides that, "[w]hen the right of trial by jury is given by the Constitution or a statute of the United States or this State and the right has not been waived, the case shall be tried with a jury." Finally, *HRCP* Rule 38(a) declares:

> The right of trial by jury as given by the Constitution or a statute of the State or the United States shall be preserved to the parties inviolate.

Harada v. Burns, 50 Haw. 428, 445 P.2d 376 (1968), notes that:

> since the Hawaii constitutional provision and rule of procedure were patterned after the Federal Constitution and Rules, the interpretation of those provisions by the federal courts are deemed to be highly persuasive in the reasoning of this court.

50 Haw. at 532. The U. S. Supreme Court addressed jury trials in attorneys' fee disputes under contingent fee contracts in *Simler v. Conner*, 372 U.S. 221 (1963). In *Simler* the trial court rejected a jury trial demand holding that an action for attorneys' fees was "equitable" and not "legal" in character. 372 U.S. at 222. The Supreme Court reversed, concluding a declaratory action for attorneys' fees was "legal in character." 372 U. S. at 223. The *Simler* court ruled:

> The record discloses that the controversy between petitioner and respondent in substance involves the amount of fees petitioner, a client, is obligated to pay respondent, his lawyer.

> Petitioner admits his obligation to pay a "reasonable" fee under a contingent fee retainer contract stipulating that reasonableness may be set in a court trial. Respondent relies on a subsequent contract specifying 50% of the recovery, under certain circumstances, as the amount for the fee. Petitioner counters that the latter contract is the product of fraud and overreaching by the lawyer.

372 U.S. at 223. "The case was in its basic character a suit to determine and adjudicate the amount of fees owing to a lawyer by a client under a contingent fee retainer contract," said the Court, which is a traditionally "legal" action. *Id.* Finally:

> The questions involved are traditional common-law issues which can and should have been submitted to a jury under appropriate instructions as petitioner requested.

372 U.S. at 223; *see also, Sarkeys v. Haas*, 402 P.2d 894, 899 (Okla. 1965) ("[in] an action brought for attorneys' fees, the issue as to what would be a reasonable fee for services rendered is an issue of fact to be determined by the jury"); *Neal v. Drainage District No. 2*, 248 P. 22, 24 (Idaho 1926) ("[t]he court erred in denying the appellant a jury trial and for this reason the cause must be reversed"); *Taylor v. Barnhill*, 470 P.2d 902, 904 (Colo. 1970) ("the burden is upon the attorneys to prove that the arrangements were fairly and openly arrived at and to prove the reasonable value of the services rendered [which] are questions of fact to be determined by the jury"); *Jacobs v. United Electric Rys. Co.*, 125 A. 286, 288 (R.I. 1924) ("[t]he question of whether the plaintiff has a contract with Mrs. Coreira was for the jury to decide on the conflicting testimony, and not for the trial justice"); *Milton Kelner v. 610 Lincoln Road, Inc.*, 328 So.2d 193, 195 (Fla. 1976) ([t]hat issue was submitted to the jury"); *Wolfe v.*

Campbell, 320 P. 506, 506 (Okla. 1924) ("[i]n an action for a specific attorneys' fees, were issued is joined as to what is a reasonable fee, such issue is for the jury, notwithstanding the plaintiff may pray that an equitable lien be decreed against defendant's land").

Nor did GNLJ's request for equitable relief in the form of an attorneys' lien alter the application of the jury trial right in this case. The issues joined at the July, 1989 hearings focused on the reasonableness of the fees and the legality of the fee contract. These were legal issues, triable before a jury.

In *Jarman v. Hale*, 731 P.2d 813 (Idaho 1986), the Idaho Supreme Court cited *Simler v. Conner, supra*, and concluded "[t]he Hales were entitled to have these disputed issues of fact determined by a jury," despite encountering these issues in a lien enforcement action:

> The Idaho Supreme Court in *Neal v. Drainage District No. 2*, 42 Idaho 624, 248 P. 22 (1926), held that under article I, section 7 of the idaho Constitution, a defendant has a right to a jury in an action to recover attorney fees. Similarly, the United States Supreme Court held that "a suit to determine and adjudicate the amount of fees owing to a lawyer by a client" is a legal action presenting issues to be submitted to a jury. *Simler v. Conner*, 372 U.S. 221, 223, 83 S.Ct. 609, 611, 9 L.Ed.2d 691 (1963). *Accord Taylor v. Barnhill*, 470 P.2d 902 (Colo.Ct.App. 1970); *Sarkeys v. Haas*, 402 P.2d 894 (Okla. 1965). The record before us presents a factual dispute over terms of the parties' agreement as to whether fees have been earned and properly billed. The Hales are entitled to have these disputed issues of fact determined by a jury.

731 P.2d at 818. "However," said the *Jarman* court, "separate issues are posed by a charging lien of an attorney

that are equitable in nature and triable to the court." *Id.* The *Jarman* court remanded for jury trial on the issues surrounding the terms of the fee agreement and the reasonableness of the fees, and a court hearing on the charging lien.

Jury trials for joint legal and equitable claims are discussed by Professor Moore in is annotations on the federal jury trial rule, *Federal Rules of Civil Procedure* Rule 38(a):

> There is no waiver of the right to jury trial on the legal issues by virtue of the presence of equitable issues; the legal issues are for the jury, if timely demand therefore is made, otherwise they are for the court along with the equitable issues.

5 *Moore's Federal Practice*, Section 38.11[6]. Moore observes:

> a claim basically legal does not lose its character as such because it is joined to a claim for equitable relief or brought as a counterclaim, crossclaim or third party claim in an action in which the main claim is equitable in nature. The question is still, then, whether the plaintiff's claim is basically legal or equitable or whether legal or equitable claims have been joined. If legal there is a right to a jury trial on timely demand.

5 *Moore's Federal Practice*, Section 38.16[4]. Hawaii decisions are in accord: *see e.g., Board of Directors v. Regency Tower Venture*, 2 Haw.App. 506, 513, 635 P.2d 244 (1981) ("where both legal and equitable issues are presented in a single case, only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims"); *Assn. of Apt. Owners of Magellan v. Sequito*, 6 Haw.App. 284, 288, 719 P.2d 746 (1986) ("a claim that would otherwise be triable to a jury must be so tried even though it may be

thought 'incidental' to a claim for an injunction"); *Harada v. Burns*, 50 Haw. 528, 536, 445 P.2d 376 (1968) ("[i]f any common issue as between the equitable claim and *any* legal claim is to be determined first by a jury in order to preserve the right to a jury trial as to that legal issue, then *a fortiorari* if the issues are not common, the legal issues should be determined by a jury and not be foreclosed by a determination of a judge on those issues").

Finally, in 1944 this Court concluded that the question of the reasonableness of attorneys fees is for a jury:

> The plaintiff's testimony tended to show that the whole matter was fully explained to the defendant and that she signed the [agreement] with full knowledge of the words. On the other hand, the defendant's testimony tended to show that the [agreement] was not explained to her and that she did not know what she was signing. In this state of the evidence *the question of whether there was an account stated should have been left to the jury*.

Russell v. Makainai, 31 Haw. 599, 600 (1944) (emphasis added).

* * *

(3)

No. 90-1703

FILED
JUN 4 1991
OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

EUGENIE PARNAR,
Petitioner,

v.

GREEN, NING, LILLY & JONES,
Respondent.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE JUDGMENT OF THE HAWAII SUPREME COURT

EPHRAIM MARGOLIN
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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE JUDGMENT OF THE HAWAII SUPREME COURT

INTRODUCTION

While Petitioner disagrees with much of what Respondent has to say about the facts and the law in this case, she recognizes the limits of Supreme Court Rules 15.6 and 33.3(c), and this pleading will accordingly be limited to specific issues first raised in Respondent's Opposition to the Petition. As will be shown, Respondent has demonstrated no reason why the Petition should not be granted.

I

THE FACT THAT THE HAWAII SUPREME COURT'S DECISION WAS UNPUBLISHED, IS TOTALLY IRRELEVANT.

Respondent argues that because the decision of the Hawaii Supreme Court is unpublished, "[B]y definition, it affects and 'is of interest and importance only to the immediate parties,' and can present no issue that qualifies as 'important' for certiorari." (opposition at 12).

By this reasoning, any court in the land could shield from this Court's review the most egregiously unconstitutional decisions simply by leaving them unpublished. This, of course, is not the law. To quote Stern, Grossman and Shapiro, *Supreme Court Practice* (6th Ed. 1986) at 213 and 374 (also quoted by Respondent but apparently misunderstood), the importance of a case is determined by "how many persons . . . will be affected by *the questions presented*," not by how many people are affected directly by the decision itself. The questions presented by the present case are of enormous importance both in civil litigation generally and with regard to the role of this Court in guiding constitutional jurisprudence generally.

This Court regularly grants certiorari to review unpublished decisions which present significant legal issues. *See,* e.g. *United States v. Rojas-Contreras* 474 U.S. 231, note 1 at 232 (1985), *Burlington Northern R. Co. v. Oklahoma Tax Commission* 481 U.S. 454, 460 (1987) and *Commissioner v. McCoy* 484 U.S. 3, 7 (1987). This Court's decision in *McCoy* is worth quoting:

> [T]he fact that the Court of Appeals' order under challenge here is unpublished carries *no weight* in our decision to review the case. The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is nonpublished. (484 U.S. at 7) (emphasis added).

The same principle applies in the present case.

II

THE ASSERTION THAT PETITIONER FAILED TO FILE A TIMELY DEMAND FOR A JURY TRIAL IS TOTALLY WITHOUT MERIT.

Respondent asserts that Petitioner's May 25, 1989 demand for a jury trial was untimely.

Respondent first raised this "issue" in a footnote in an appellate brief filed in the Hawaii Supreme Court May 22, 1990 (note 3, Answering Brief of Appellee/Cross-Appellant Green, Ning, Lilly and Jones, at 14). This assertion was never made in the trial court, and Respondent does not claim that it was. Consequently, untimeliness was not and could not have been the basis of the denial of a jury trial to Petitioner.

In any event, the claim is totally without merit. As Petitioner stated in her responding footnote in the Hawaii Supreme Court:

> This claim is false. On May 25, 1989 Parnar asked that "a jury determine the issues raised in the Motion for Enforcement of Attorneys' Lien," (RA-XIII at 1-7, 2). HRCP Rule 38(b) requires a jury demand *"not later than 10 days after the service of the last pleading directed to such issue."* GNLJ amended its motion for enforcement of attorneys' lien on July 3, 1989 (RA-XIII at 141-189) and Parnar filed a supplemental hearing brief on July 6, 1989 (RA-XIII at 194-201). Parnar's jury demand was timely and complete. (note 3, Reply Brief of Eugenie Parnar, at 2) (emphasis added).

III

RESPONDENT IS IN ERROR TO ASSERT THAT AN ADEQUATE STATE GROUND FOR DENYING A JURY TRIAL WAS THAT THE REQUEST WENT TO LIMITED ISSUES, OR THAT CONSEQUENTLY THERE WAS ONLY "HARMLESS ERROR".

Respondent asserts that an "adequate state ground" for denying a jury trial was that the "only" issue for which a jury trial was demanded was "what constitutes a reasonable and proper attor-

ney's fee, if any" payable by Parnar to Respondent, and alternatively that there was "harmless error."

There is no practical difference between what is the "reasonable and proper" fee and what is the "amount due." Additionally, the issue of whether there is "any" amount due is, of course, the same as the issue of entitlement. As noted in the Petition herein, Petitioner sought a jury trial as to all issues concerning the "amount due," (RA-XII, at 93), conceding to court trial only an "equitable" issue: "determination of the validity and scope of [the] lien" (id). Thus the jury demand conceded to court trial the entitlement to a *lien*, but not entitlement to a *fee*.

For these reasons, Respondent's "harmless error" assertion (Opposition at 12) is without merit.

IV

RESPONDENT INCORRECTLY CLAIMS THAT PETITIONER DID NOT RAISE THE RELEVANT FEDERAL ISSUES BELOW. RESPONDENT COMPLETELY MISUNDERSTANDS THE NATURE OF THE FEDERAL QUESTION INVOLVED IN THIS CASE.

Petitioner does not claim now and did not claim below that Hawaii is ultimately bound by the Seventh Amendment or by Rule 38, FRCP. Petitioner does claim, however, that a "federal question" is properly before this Court when a state has concluded that its laws incorporate federal precedent (whether as to a constitutional provision, a statute, or a rule of court), and there is a dispute over that federal precedent. *See,* e.g. *Pennsylvania v. Finley,* 481 U.S. 551 (1987), *St. Martin Lutheran Church v. South Dakota* 451 U.S. 772 (1981), and *Standard Oil Co. of California v. Johnson* 316 U.S. 481 (1942). Respondent has not even discussed these cases, let alone explained why they are, *arguendo*, inapplicable in the present context.

Petitioner asserted in her briefs below that the Hawaii Supreme Court must, under Hawaiian law, follow federal precedent *despite* the fact that the Seventh Amendment is not directly applicable, citing *Harada v. Burns* (1968) 50 Haw. 528, 445 P.2d 376, which

interprets the Hawaiian Constitution as having " 'preserved' the language of the United States Constitution in order to 'preserve' also the judicial interpretation" (note 1, 445 P.2d at 380). *See*, Petitioner's Opening Brief in the Hawaii Supreme Court, at 19 et seq. On that basis, Petitioner cited on appeal the Seventh Amendment and this Court's decision in *Simler v. Conner* 372 U.S. 221 (1963).

Respondent did not dispute below and does not dispute now the proposition that Hawaii follows federal precedent, but only disputed how that precedent was to be interpreted.

Hawaii could have chosen to interpret its constitution as *not* "preserving the language of the United States Constitution in order to preserve also the judicial interpretation," but that isn't the choice Hawaii has made. Among those jurisdictions which have chosen to be bound by Seventh Amendment precedent, there is disagreement as to whether a litigant is entitled to a jury trial in situations analogous to that of the present case. As Parnar pointed out in her petition to this court, Hawaii appears in the present case to stand alone among those states which have incorporated the Seventh Amendment as a rule of construction into their own rules of civil procedure or constitutional jury-trial rights, in denying the right to a jury trial in a lien-enforcement proceeding in which there are "legal" defenses.

Accordingly, there is a split among the states as to a federal question, justifying the grant of certiorari in this case.

V

RESPONDENT'S RELIANCE UPON PRECEDENT FROM STATES WHICH DO NOT THEMSELVES RELY UPON FEDERAL PRECEDENT IS MISPLACED.

Respondent cites cases concerning the right to a jury trial from Missouri, Minnesota, Nebraska, and Colorado, without asserting that any of those states attempt to follow federal precedent on this issue. Those cases are, as a consequence, irrelevant in the present context. Those cases from courts which do attempt to follow federal precedent with regard to the right to a civil jury trial have,

with the exception of Hawaii, concluded in situations analogous to the present one, that there is such an entitlement. *See* Parnar's Petition at 28. Respondent does not seriously dispute this conclusion.

The cases cited by Parnar from state courts as well as from federal circuit courts (Petition at 26-27) demonstrate that there is a split of opinion both among the states which rely upon federal precedent in interpreting their civil jury trial rights, and among the circuit courts (to which, of course, the Seventh Amendment is directly applicable) as to the extent of the right to a jury trial in the lien-enforcement context. Respondent does not seriously dispute that the split of authority exists. Accordingly, this is an appropriate case to grant certiorari under Supreme Court Rules 10.1 (b) and (c).

CONCLUSIONS

In summary, the reasons Respondent has urged for not granting certiorari are completely without merit. This is a case that clearly calls for application of the principles espoused in *Pennsylvania v. Finley,* 481 U.S. 551 (1987), *St. Martin Lutheran Church v. South Dakota* 451 U.S. 772 (1981), and *Standard Oil Co. of California v. Johnson* 316 U.S. 481 (1942), and for resolution of important issues of Seventh Amendment interpretation as to which there are conflicts among both state courts of last resort and federal circuit courts.

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Respectfully submitted,

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